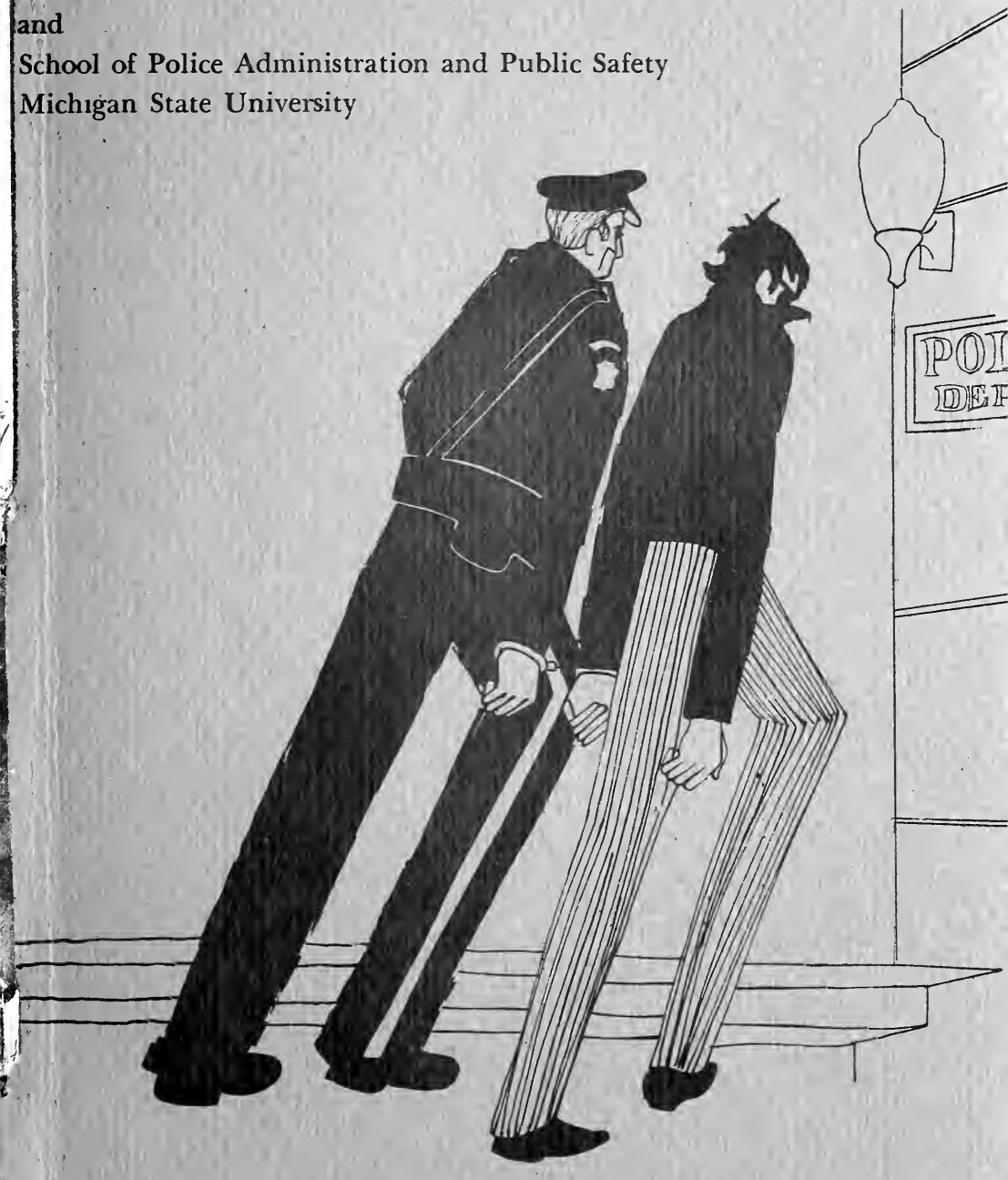
ARREST, SEARCH AND SEIZURE
Telephonic Lecture Series – Proceedings

Institute for Community Development and Services
Continuing Education Service
and
School of Police Administration and Public Safety
Michigan State University



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FOREWORD

The Institute for Community Development and Services, dedicated to studies and consultative programs which will assist communities in the resolution of their problems, has, since its establishment in 1958, been deeply concerned over those problems related to fair, impartial and effective law enforcement. Institute activities in this area have included direct consultation to law enforcement bodies, studies of the organizational structure and operational features of police departments of specific communities and an extensive and detailed directory and inventory of all local law enforcement bodies in the state.

This publication represents a further step in the Institute's continuing efforts to assist communities in this important area. The idea and general plan for an educational program for policemen on the difficult problems associated with arrest, search and seizure was conceived by Bruce T. Olson, Institute specialist in public administration with an extensive background in the law enforcement field.

Direct responsibility for building the original conception into its final operational form, however, was in the hands of Melvin Gutterman. Uniquely qualified to direct the program, of which this publication represents the proceedings, Mr. Gutterman has his LL.B. degree from the Brooklyn Law School, an LL.M. in criminal law from Northwestern University School of Law (in connection with which he conducted an exhaustive analysis of the informer privilege) and experience as police legal advisor to the Chicago, Illinois, and Oakland, California, police departments. This fall (1968), Mr. Gutterman goes to Pennsylvania State University as associate professor to teach in their police administration program.

The program, which was the basis for these proceedings, was so well received by law enforcement personnel that we have been encouraged to attempt a second effort, based on somewhat different problems and using a different educational approach. The new program, to be conducted in 1968-69, like the present one, will be co-sponsored with the School of Police Administration and Public Safety at Michigan State University.

Duane L. Gibson, Director
Institute for Community Development
and Services
Michigan State University

PREFACE

One of the consequences of our decentralized form of local police organizations is that it is often difficult to bring policemen together for the type of training they need and want. The police officer is not satisfied with a superficial treatment of those things he is supposed to know about his profession. He needs and wants instruction in depth from those persons whom he can look upon as experts.

Financed by a grant under Title I of the Higher Education Act of 1965, the Michigan State University Institute for Community Development and Services and the School of Police Administration and Public Safety devised a series of eight Tele-Communication Lectures for law enforcement officials in an attempt to find a solution to this problem.

A tele-conference set up is a two-way, amplified communication system, designed to bring together, conveniently, a speaker and a group by means of a regular telephone network. The application of this concept enabled a lecturer to speak to a number of police audiences in different locations simultaneously. The individual policemen in each audience also actively participated in a question-and-answer period at the end of each lecture.

Ten locations throughout Michigan were selected for this training experiment. A total of 562 men, representing 86 police organizations, participated in the program.

At each session, the police officer heard a carefully planned lecture by a nationally known authority in criminal law. The lectures dealt exclusively with the troublesome aspects of arrest, search and seizure — from the philosophy and history behind the exclusionary rule to the future trends in the law.

For the police officer, the learning process must be continuous. Through this new and experimental program, it is hoped that many of the troublesome problems that the police officer had regarding the law of arrest, search and seizure were identified and resolved.

A thorough understanding of this area by law enforcement officials is essential if the crisis in the street is to be abated.

I wish to record my grateful appreciation to Dr. Duane L. Gibson of the Institute for Community Development and Services, and Professor Arthur Brandstatter of the School of Police Administration and Public Safety, for their help and assistance in making this program possible. I also wish to accord my thanks to all the lecturers who participated in the program and to Miss Susan Silk for assisting with this manuscript.

Melvin Gutterman, Director
Criminal Law Program
Michigan State University
September, 1968

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THE EXCLUSIONARY RULE: Its History and Philosophy

by B. James George, Jr.*

A police officer might wonder why the first talk in a series like this one is on the topic of exclusionary rules of evidence. That on the face of it should be a concern of judges, prosecuting attorneys and defense counsel; it is a technical matter dealt with in the courtroom and not in a police station or police cruiser. It is the police officer's task to acquire proof of the crime and apprehend the criminal, not to enter into technical questions of evidence law.

In fact, however, the exclusionary rules of evidence developed by the courts, and particularly the United States Supreme Court, make the individual police officer the key man in the total system of criminal procedure. In terms of the outcome of the prosecution, his activities in investigating a crime are more important to the protection of the public than anything the judge and attorneys may do, because they cannot be undone. If the judge or an attorney errs, the consequence may be delay in the completion of the prosecution while the courtroom procedure is repeated in a proper manner, but in most instances it will still be possible to obtain a conviction. If the police officer is in error, however, there is no second chance. The evidence that he has obtained becomes legally tainted, and is inadmissible directly or indirectly in any judicial proceeding, even though this may mean that the state cannot convict a self-admitted criminal. The officer, in short, has no second chance in the case he is investigating. Therefore, it is desirable, and indeed necessary, to look closely at exclusionary rules of evidence as a technique for judicial control of the police before examining the details of the law regulating investigative activity, because these evidence rules have become the key to the whole system.

There are four aspects of the rules that are important to consider: (1) the judicial development of the various rules of evidence, (2) the kinds of evidence that can be excluded, (3) the procedures by which the

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issue of exclusion is decided, and (4) the implications of the rules for police officers.

I. Judicial Development of Exclusionary Rules

The Common-Law Background.

The idea of refusing to consider material that might possibly have some relevance to a case under litigation is no new idea in the American and British legal systems. Most other systems of law, including the European, Soviet and Japanese, also refuse to consider some kinds of evidence under certain circumstances. The important question is *why* the evidence is not allowed before the court. In the common-law tradition of England and the United States, the basic reason for refusing to admit something that might help prove the point that is being contested in the litigation was that it was not trustworthy enough to be permitted before a jury. Putting it another way, though the evidence tendered might have some tendency to prove or disprove the matter at issue, if there were doubts about its actual reliability, and particularly if there were danger that a jury might attach far greater importance to it than a lawyer or judge might think proper, the evidence would be ruled inadmissible.

While I cannot give even a capsule course in the law of evidence in the brief time available, a few illustrations are possible. If Smith wants to testify that Jones told him that he had seen the defendant take a bicycle, the contents of Smith's statements are in form relevant to prove that the defendant committed larceny. But if Smith does testify to this effect, the defense attorney's cross-examination can only probe whether Smith is telling the truth about his own experience, which is that Jones told him the story. He does not have the first-hand experience to permit the accuracy of Jones' account to be probed. Therefore, lawyers call Smith's information "hearsay" and he will not be permitted to testify about what Jones told him. It is necessary to find Jones and bring him in to testify, so that the accuracy of his observations can be inquired into.

If, however, there are special circumstances that lawyers believe lend credibility to the statements that are indirectly reported, or if the third party is unavailable so that the need for the statement outweighs the danger of possible misuse, the evidence may come in under one of the many so-called "exceptions" to the hearsay rule. The rule is that more hearsay is admissible than inadmissible. As examples, hearsay may be in papers made in the regular course of business. If the regularity of the entry is established, the record will be admitted for jury use of its contents. It might be that the person is no longer available to give testimony. If, for example, the victim knows that he is dying and names his assailant, his statement is admissible in a criminal case as a "dying declaration." If a witness has testified at a preliminary examination or an earlier trial of the same case and undergone cross-examination or an earlier trial of

the same case and undergone cross-examination, but becomes unavailable for testimony at trial, the transcript of his testimony can be read. In the case of the hearsay exception that police are most often directly concerned with, we assume that a man does not say something about himself that is not so; therefore, the admissions of a party to the case are admissible if they later prove to be detrimental to his interest. It is on this basis that confessions are viewed as admissible exceptions to the hearsay rule (and they are hearsay, because the officer testifies that the defendant told him that something had happened, which means that the officer lacks firsthand knowledge of the actual event).

But none of the traditional rules was concerned with regulating police conduct. This development has arisen within the past fifty years, and has had its greatest expansion in decisions within this decade. How did these new rules develop?

Search and Seizure.

Before 1914 the United States Supreme Court had held that a citizen could resist a subpoena or court order requiring him to produce incriminating evidence on the basis of his privilege against self-incrimination. This was hardly a radical innovation; all it amounted to was a specific application of the accepted proposition that a court could not call a defendant to the stand or force a witness to answer an incriminating question. In 1914 the Court broke with precedent by ruling that if federal officers made an improper search and illegally seized the defendant's property, that property was to be suppressed as evidence.[1] The Court felt that unless the evidence, which in this instance comprised incriminating personal letters seized in the defendant's home, were suppressed, "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[2] The fact that the evidence seized was documentary, and thus the kind of material that the defendant could not have been ordered to produce on court order, was probably material to the decision; one might speculate whether the same conclusion would have been reached if the body of a federal official or large amounts of counterfeit money had been found. But the precedent had been set for federal practice. A minority of the states, including Michigan,[3] adopted the search and seizure exclusionary rule as a matter of their own state practice, but the majority adopted the criticism of the exclusionary rule by the then-Judge Cardozo of the New York Court of Appeals: "The criminal is to go free because the constable has blundered,"[4] this was too great a price to pay unless the legislature specifically decreed it.

[1] Weeks v. United States, 232 U.S. 383 (1914).
[2] 232 U.S. at 393.
[3] People v. Marxhausen, 204 Mich. 559, 171 N.W. 557 (1919).
[4] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585 (1926).

The matter remained in this posture for over fifty years. In 1949 the United States Supreme Court refused to make the exclusionary rule binding on the states under the Fourteenth Amendment, and even indicated that it was simply a rule of evidence in enforcement of, but not a part of the Fourth Amendment.[5] But in 1961 the Court reversed itself and held that the exclusionary rule is directly a part of the Fourth Amendment and that all the Fourth Amendment is incorporated into the Fourteenth, so that every state is required to exclude unlawfully seized evidence in order to control police misconduct.[6] Though the Michigan Supreme Court still views the weapons and narcotics exceptions in the Michigan Constitution [Art. I, § 11 (1963)] to be constitutional, this flies directly in the face of *Mapp* and will ultimately be struck down by a federal court.[7] After 1961, the search and seizure exclusionary rule is a matter of federal constitutional law, not state legislative or judicial option.

Wiretapping.

The second area in which the United States Supreme Court developed an exclusionary rule of evidence is wiretapping. In 1928 it held that wiretapping was not within the Fourth Amendment as long as there was no physical trespass on premises owned or under the control of the defendant.[8] A few years later the Federal Communications Act was revised to include a prohibition against anyone intercepting and divulging the contents of a telephone, telegraph or radio message without authorization of the sender [47 U.S.C. § 605]. The Court then interpreted this as requiring exclusion of wiretap-derived evidence in federal cases to discourage police wiretapping.[9] The rule was not considered as a matter of federal constitutional law, and so was not held to apply to the states under the Fourteenth Amendment.[10]

This, however, is probably no longer a safe proposition on which to rely. On June 12, 1967, the United States Supreme Court found the New York statute authorizing wiretapping under court order to be unconstitutional.[11] Though the Court did not specifically overrule the *Olmstead* case, the opinion is in terms of Fourth Amendment requirements, so that it is probable that the exclusionary rule will be asserted against wiretapping done by state officers.

Confessions.

Confessions induced by violence, threats or promises of benefit have long been considered inadmissible. The original reason, however, was

[5] Wolf v. Colorado, 338 U.S. 25 (1949).
[6] Mapp v. Ohio, 367 U.S. 643 (1961).
[7] People v. Blessing, 378 Mich. 51, 142 N.W. 2d 209 (1966).
[8] Olmstead v. United States, 277 U.S. 438 (1928).
[9] First Nardone Case, 302 U.S. 379 (1937).
[10] Schwartz v. Texas, 344 U.S. 199 (1952).
[11] Berger v. New York, 388 U.S. 41 (1967).

that they were in fact likely to be untrustworthy, but would be viewed by lay jurors as reliable. Putting it another way, a coerced confession did not meet the requirements originally laid down for treating party admissions as an exception to the hearsay rule.

However, the United State Supreme Court's attention began to shift from the trustworthiness of the confession given in the individual case to the general desirability of the methods used by the interrogators to obtain it. On the federal level, the Court held that if any statement was obtained from a federal prisoner who had not been brought promptly before a United States commissioner or judge as required by law [F.R.Cr.P. 5(a)], it was inadmissible whether or not it was voluntary and even if it was admitted by the defendant to be voluntary.[12] Most states, incidentally, refused to take over the *McNabb-Mallory* rule, but the Michigan Supreme Court has adopted it as a matter of Michigan due process.[13]

The United States Supreme Court also held that if a federal prisoner was under indictment, he could not be questioned or interrogated unless his attorney was actually present.[14] The fact that *Massiah* was relied on in the lineup decisions, which I will discuss shortly and which are binding on the states, probably indicates that this is a limitation on state officers as well.

It was in the *Escobedo* case [15] and most recently in *Miranda*[16] that it became absolutely clear that the United States Supreme Court is concerned with the methods police officers use to obtain confessions and not the reliability of the particular confession. Later speakers will go into the details of these new rules. For our purposes, it is necessary only to stress that the rule excluding confessions is now clearly an exclusionary rule in the sense we are using that term in this series — a rule that excludes evidence in order to discipline police officers.

Lineups.

It may appear odd to include the lineup in the listing of exclusionary rules of evidence. This, however, is the newest entry in the list of exclusionary rules of evidence. In three opinions rendered June 12, 1967, the United States Supreme Court held that a line up conducted in the absence of counsel violates due process of law.[17] The details of the new cases will be laid out for you by later speakers, but the net result is an exclusionary rule. Direct testimony in court of the fact that an identification had been made during an improper police lineup proceeding is in-

[12] Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).
[13] People v. Hamilton, 359 Mich. 410, 102 N.W. 2d 738 (1960).
[14] Massiah v. United States, 377 U.S. 201 (1964).
[15] Escobedo v. Illinois, 378 U.S. 478 (1964).
[16] Miranda v. Arizona, 384 U.S. 436 (1966).
[17] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

admissible under any circumstances; on occasion the witness himself may be prohibited from testifying to identity of the defendant as the criminal if the court believes it is the lineup identification that gives rise to the courtroom testimony. All this is required so that the police are forced to conform lineup procedures to the requirements set down by the Court, which is the hallmark of the exclusionary rule, whatever its context.

Entrapment.

The doctrine of entrapment is usually classified formally as a matter of the law defining crimes, because of the explanation for the rule given in the United States Supreme Court decisions that developed it.[18] However, the Court's concern is obviously with the police tactic of luring a citizen into the commission of a crime,[19] and the result is prohibition of use of evidence to convict the defendant, so that it is in fact an exclusionary rule in its actual operation even if not so in theory.

This, then, is the array of exclusionary rules of evidence that are used to regulate police investigative activity. The United States Supreme Court seems to have provided coverage of this activity that is substantially complete; in the words of *Oklahoma,* "everything's up to date in [Washington]; they've gone about as fur as they kin go." From this point on it will be the details that will concern the courts. One of the main issues in each instance is the amount of evidence that must be excluded if the officer is viewed by the judge as having acted improperly in the legal sense.

II. Exclusion of Derivative Evidence

Whenever the United States Supreme Court has developed a new exclusionary rule, it has quickly held that derivative evidence is also barred as "fruit of the poisonous tree" on the ground that if only the material originally obtained is inadmissible, but anything else gotten as a result is admissible, much of the incentive to conform would be destroyed.

This idea in a sense predates the United States Supreme Court's concern with the police. In considering the validity of legislation conferring immunity against prosecution in order to destroy a witness's claim of privilege against self-incrimination, the Court held that it was not enough merely to forbid the use as admissions of the witness's testimony. Instead, it was necessary to prevent use of his testimony to search out other evidence to be used against him.[20] This requirement that derivative evidence be excluded along with directly-compelled evidence has recently been restated by the Court.[21]

[18] Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1923).
[19] Cf. Osborn v. United States, 385 U.S. 323, 311-32 (1966).
[20] Counselman v. Hitchcock, 142 U.S. 547 (1892).
[21] Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

But the ban on derivative evidence is always a part of the exclusionary rule applicable to police. In the search and seizure context, the use of material discovered as a result of the matter seized is equally forbidden.[22] This is, of course, a part of the *Mapp* rule, so that state courts must apply it also. Usually the concern is with tangible evidence. But in one recent decision the United States Supreme Court held that a confession can be the fruits of an unlawful entry into premises or of a confrontation of the defendant with evidence unlawfully seized.[23] This, too, is something that state judges and police officers must take account of under *Mapp*.

A derivative evidence rule is also part of the wiretapping rule developed under the Federal Communications Act.[24] If the *Berger* case has made wiretapping and eavesdropping a specialized form of search and seizure, and thus within the Fourth and Fourteenth Amendments, the result clearly will be that derivative evidence as well as the primary evidence, the overheard conversations, will be inadmissible. There is also a question under the new Michigan eavesdropping statute [P.A. 319 of 1966, M.S.A. §§ 28.807(1)-28.807(9)] whether police surveillance activity is "unlawful," that is, "not otherwise prohibited by law" [M.S.A. § 28.807-(7)(a)], and thus not a prohibited divulgence [M.S.A. § 28.807(5)]. If it is, this is an additional statutory ground for excluding primary, and probably derivative evidence.

A derivative evidence rule has not traditionally been a part of the coerced confessions rule because of the reasoning on which that rule originally rested. The coerced confession itself could not be used, but the fact that concrete evidence was discovered through information in the confession tended, if anything, to confirm the reliability of the confession. The derivative evidence, therefore, was admissible in part on its own strength and in part as corroboration of the state's contention that the confession itself was trustworthy.

A second confession might also be viewed in one sense as derivative evidence if its predecessor had been coerced, and if the circumstances viewed as constituting coercion or their lingering after-effects were considered to have affected the reliability of the second statement. This, however, was not in fact a true derivative evidence rule, but rather a heightened suspicion about the validity of the second confession because of what the court knew about the circumstances surrounding the obtaining of the first one.

It is a matter of controversy among lawyers whether the *Miranda* decision requires that derivative evidence now be excluded, thus supplanting the earlier practices in this regard. Certainly the logical outflow from

[22] Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920).
[23] Wong Sun v. United States, 371 U.S. 471, (1963); Fahy v. Connecticut, 375 U.S. 85 (1963).
[24] Second Nardone Case, 308 U.S. 338 (1939).

the United States Supreme Court's stated desire to control police interrogation methods is a derivative evidence rule. However, the Court has not yet been faced squarely with the issue, so that as far as I am concerned the issue is an open one. There is a possibility that the majority Justices might at some time in the future say that a derivative evidence rule has in fact been in effect since June, 1966, or that the laying down of the derivative evidence rule in this future case is retroactive in application. However, the Court has not made most of its recent rules retroactive, so that it is a reasonably safe assumption on which to operate, that leads in confessions may be pursued even though for one reason or another the confession might ultimately prove to be inadmissible. However, it should also be stressed that a case of gross abuse of a defendant in order to obtain information about other evidence could very possibly prove the one that the Court uses to decree a derivative evidence rule, so that as much care as possible should be taken to conform to the *Miranda* requirements even though there is no immediate thought of using the suspect's statements other than for departmental information.

The new rule on lineups also turns in large measure to a derivative evidence concept, though in this instance it is the witness's identification of the defendant in the courtroom that is "derived" from the original improper lineup procedure. It is too early to know how troublesome this derivative evidence rule will prove to be, but it is obvious that it will be a difficult one for a trial judge to administer.

Lawyers and judges are very much concerned with another aspect of the exclusionary rule of evidence, that of the kinds of proceedings in which the tainted evidence must be excluded. This is not primarily a matter for the police officer, except that he should know that an error on his part can have reprecussions beyond the particular criminal case he is investigating. The evidence, including derivative evidence, will of course be unusable in every stage of the criminal proceeding against the suspect. But it may also be unusable in a case against a fellow criminal tried separately. It will be inadmissible in any forfeiture action brought against the suspect's property, for example, under the liquor or cigarette tax law. It may affect the state's right to collect taxes or enforce claims against the suspect's property in general, judging by some of the developments in the area of federal income tax investigations. And the Michigan Supreme Court has held that the officer cannot testify to what he saw or obtained illegally even though neither he nor the State of Michigan is a party to the civil case in which the officer is subpoenaed to testify.[25] About all that can be said is that a police officer ought not be surprised if his evidence is ruled inadmissible in proceedings not directed against the criminal defendant with whom he dealt originally.

[25] Libel v. Swincicki, 354 Mich. 427, 93 N.W. 2d 281 (1958).

There is, however, a matter of procedure with which every officer should be concerned — the time and place of defense applications to suppress evidence.

III. Proceedings to Exclude Evidence

When the United States Supreme Court set forth the first true exclusionary rule in the *Weeks* case, it indicated that it would not be unreasonable to require the defendant to move to suppress before trial of the case actually began, provided he was aware of the fact that the officers had seized evidence from him. In this way it would be possible to avoid the procedural inconvenience that flows from stopping the trial in mid-course to test the admissibility of evidence out of the jury's presence. The trial court would have discretion to ignore this requirement, but the expectation was that defense counsel would move as quickly as possible. This procedure was written into the Federal Rules of Criminal Procedure, and has tended to become a part of standard state procedure as well; it is the Michigan practice even in the absence of a specific court rule or statute. The defendant is not limited to the motion to suppress, however. If he has a legitimate property claim to what was taken, he can bring an action of replevin on the civil docket.[26] The Court has stated about the same thing this last Term.[27]

The pretrial motion to suppress has also been the way in which complaints of wiretapping have been asserted in federal courts. Very few states have been concerned with the problem of evidence obtained by wiretapping and eavesdropping, so that there is rarely anything specific about how that question is to be raised in a state case. Since, however, the *Berger* decision seems to bring eavesdropping under the Fourth Amendment, the motion to suppress will easily expand under Michigan and other state practice to include these questions as well as the traditional issues of search and seizure.

In most states including Michigan, the ultimate decision of whether to use a confession or not was left to the jury unless the judge was prepared to say that there was no chance at all, legally speaking, of the jury finding it voluntary. Since the evidence about the circumstances under which the confession was obtained was almost always conflicting, this meant that the jury heard about the confession as well as the circumstances under which the defendant gave it, and probably, therefore, in fact relied on it. Consequently, the United States Supreme Court dictated another change in state practice when it required the judge as a constitutional matter to determine whether the confession is constitutionally admissible, in a proceeding held outside the presence of the jury.[28] The judge cannot

[26] Dawkins v. Edwards, 375 Mich. 330, 134 N.W. 2d 756 (1965).
[27] Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967).
[28] Jackson v. Denno, 378 U.S. 368 (1964).

evade this responsibility.[29] But there is also no requirement that he refuse to permit the matter to be raised before trial commences.

A similar problem is inherent in the lineup rule, under which the trial judge is to determine whether the witness's testimony is the product of an unconstitutionally conducted lineup. This will have to be done in the course of the trial in the absence of the jury, and will probably resemble the *Jackson* hearing in many respects. Here again, however, there is nothing that forbids defense counsel to assert the matter before trial.

It is very probable that within the next two to three years, all these matters will be handled in a consolidated pretrial motion to suppress. There is nothing that prevents this from being done now except the habit of doing certain things certain ways.

Whatever the particular subject matter of the pretrial motion, all these efforts to suppress evidence have one thing in common from the police officer's point of view. It is the state that is on trial for this portion of the criminal case, which means that in fact it is the investigating or interrogating officer who is being examined. This is reflected in the legal standards governing the hearing. The defendant has the burden of showing that there has been a seizure of evidence or that he gave a confession. But at this point the burden shifts over to the state to establish by the greater weight of the evidence that the police met the constitutional requirements that apply to them. In other words, it is not up to the defendant to show that the officers acted unlawfully, but instead the responsibility of the officers to persuade the judge that they acted lawfully. If they no longer have the evidence to present that shows they acted properly, the court is required to grant the defense motion unless one of two other things can be said.

One is that though there was originally an unconstitutional act on the part of the police officers, there were so many intervening circumstances that the "taint" should be considered to have become attenuated. A somewhat related idea is that if the officers had an independent source for the evidence, so that it was not in fact the product of the improper police activity, it can be admitted as evidence. This is not something that can be assumed; it must be established by police testimony.

The second is that the evidence is not important enough to affect the outcome of the case. The United States Supreme Court in one case this Term set down a constitutional "harmless error" rule, so that if the trial court is able "to declare a belief that [the error in question] was harmless beyond a reasonable doubt," it can ignore the illegality.[30] The rule itself governs whether the trial judge should grant a new trial after the defendant has been convicted, and so does not directly apply to determina-

[29] Sims v. Georgia, 385 U.S. 538 (1967).
[30] Chapman v. California, 386 U.S. 18, 24 (1967).

tions on a pretrial motion to suppress. But it may reduce somewhat the likelihood that the trial court will be overruled by an appellate court, and so may encourage him to deny some motions to suppress that he might otherwise have granted. Another control, incidentally, on trial court rulings that carry these constitutional doctrines beyond their legitimate bounds, would be the authorization of an appeal by the prosecution against the granting of a motion to suppress. This was included in the recommendations of the President's Crime Commission, and is something that police organizations should actively support.

Because the burden is on the prosecution to justify the admissibility of contested evidence, it is essential that police departments keep as complete records as possible of how they obtain evidence. In a number of cases it is likely that the officers investigating the case in fact did act within proper bounds, but because they could no longer testify under oath specifically to what took place their evidence has appeared confused and evasive, so that the judge has granted the defense motion.

Therefore, particularly in important felony cases, departments should keep as complete records as possible of the time, place and circumstances under which tangible evidence is received or obtained. If the evidence has been gotten through leads from outside sources, these sources should be identified. This is particularly important if the defendant's confessions or admissions also make reference to that property. If the police can show that they also received information about the existence of the evidence from sources other than the defendant, this makes it possible for the court to rule later that there is no relationship in fact between the confession and the derivative evidence, or that the relationship is so attenuated that the exclusionary rule does not apply. Without this record of sources of information, the evidence may very well be excluded.

Similar care should be taken in recording the circumstances of interrogation, certainly in a serious case. Efforts increasingly should be made to use video tape recording equipment where department budgets permit; any department should be able to afford at the least sound tape recording equipment. Under no circumstances, incidentally, should there be any tape editing in the interests of economy. The tape should run throughout the transaction, and if it is necessary to change reels, the time of ending one reel and of beginning the next should be identified and recorded. If video tape is used, a clock should be visible in the recording at all times. A recording tape that starts and stops, whatever the actual explanation, is almost certain to be regarded as suspect by a judge.

The lineup is a new area for care in maintaining records. The United States Supreme Court did not decide how suspects not yet indicted and without retained counsel should be dealt with by police when it comes to a lineup. I assume that in addition to the usual *Miranda* warnings, the police should tell the suspect that no lineup can be conducted in the

absence of counsel, and that at some point counsel will be appointed for him, with no lineup conducted until the appointment is made and the attorney actually present. But I assume also that this right to representation by counsel can be waived as much as the *Miranda* right to counsel can. Therefore, this warning transaction should be recorded and documented with as much care as the *Miranda* warnings themselves require. If the lineup is held, the most complete record possible should be kept of the way in which the lineup is conducted; it should be photographed if possible. In addition, the Court is evidently concerned about whether the witness later testifies to the defendant's identity in the courtroom simply because he has identified him in the earlier lineup. The witness's initial description of the criminal should be carefully preserved; if he makes a choice from a picture before the lineup, that fact should be made a matter of record as well. Sometimes this may be embarrassing to the prosecuting attorney and sometimes not. But if the record is barren of facts, it will be even more embarrassing.

In summary, the United States Supreme Court has defined a number of duties for police to adhere to in investigating crime, has decreed the exclusion of evidence obtained in violation of these requirements, and has necessitated the holding of special hearings in which the burden is on the police to justify the legality of their activities. This in turn requires greatly increased emphasis within police agencies on maintaining accurate records so that the source of each piece of trial evidence can be accurately determined. In other words, police officers must become meticulous keepers of records. But it is also appropriate to say a few words in conclusion about the exclusionary rule as such.

IV. An Appraisal of the Rules

A debate on the desirability of exclusionary rules of evidence is usually like any other debate on something labeled "civil rights" or "civil liberties." It quickly degenerates into a hurling back and forth of abstractions, and from that into name-calling. This is as futile as a Catholic and a Jehovah's Witness "debating" theology, or an American and a Chinese Communist "discussing" what a peace-loving nation is. Only if the discussion can come down to fairly immediate and practical issues is there any chance of a meaningful conclusion being reached.

This is true in discussing exclusionary rules. The United States Supreme Court obviously believes in a psychology of deterrence. Police officers have as their primary objective the acquisition of evidence to present in court. If no controls are imposed, it will not matter to them how they get what they are after. If, however, evidence will be admissible if it is obtained in one fashion, but inadmissible if obtained in another, the police are supposed to choose the path of conduct that ensures admissibility. In effect, what is invoked is a fairly traditional theory of child-rearing,

with the policeman as the bad child. The chief difficulty is that if the underlying motivation and thought processes are not like this, the deterrent effect is limited or nil, and only a guilty criminal benefits.

My own position is that the United States Supreme Court is in fact wrong. Most of the so-called errors of law in these cases are errors in judgment by an officer acting under pressure, perhaps without adequate training to give him a basis for making an informed choice. This is often compounded by the fact that the judge who decides the matter has no first-hand acquaintance with police work, and makes no effort to remedy that lack. If the error is one of judgment, it is hard to see, or at least hard for me to see, how freeing a criminal is a more effective educational device than direct critique and discussion sessions would be. Even if education is the judicial motive, for instituting exclusionary evidence rules, there is a notable lack of effort on the part of the courts to see that the specifics of the officer's misjudgment are communicated to him and his fellow officers. The judicial opinions are general and use vague epithets like "unlawful" or "unreasonable;" they rarely state specifically what the officer should have done. Even if they do, the courts take no responsibility for disseminating their opinions to police organizations.

Nor does an exclusionary rule of evidence control deliberate misconduct on the part of an officer, a phenomenon that all of us must acknowledge is occasionally met within any group, lawyers and judges included. Someone acting deliberately to destroy property or inflict physical or other injury is not concerned with what might happen some day in court; he is getting his "kicks" right now. He could care less whether some day evidence might be excluded on the basis of what he is doing. And even if the thought did occur to him, the likelihood is fairly remote. There first has to be a criminal case with a defendant; if he or his fellow officers prefer no charges, there will not be a proceeding in which evidence can be suppressed. Even if there is, most kinds of deliberate misconduct are not aimed at acquiring evidence but appear in the way in which the citizen is arrested; impropriety in arrest procedures does not immunize the citizen from prosecution, so that there is no room for an exclusionary rule to operate, other than in the special case of entrapment. In cases like these, all the citizen can do is sue civilly, try to recover from the city if sovereign immunity to suit has been abolished (as it largely has in Michigan) or start administrative civil rights proceedings that might result in discipline of the offending officer, if offender he is.

In short, the exclusionary rule does not operate according to the theories advanced by its supporters, and benefits only criminal elements. It is the sad truth that if there had been more concern fifty years ago with creating administrative remedies against police and other official misconduct, and greater speed in abolishing the doctrine of sovereign immunity, there might have been no exclusionary rule in the first place.

But it is also the ironic truth that judicial emphasis on exclusionary rules of evidence has been accepted generally throughout the community, and by the police themselves, as an efficient means of controlling improper conduct, and that this in turn has taken most of the pressure from any movement to develop systems that will afford relief to the innocent citizen against improper action, while protecting the rest of the community against the depredations of criminals. The United States Supreme Court has wished to educate police, and in fact has done so to a considerable degree at least indirectly, but it has also blunted efforts at efficient redress of rights.

Whether this is so or not, these exclusionary rules are not going to disappear or reduce in scope unless there is a major and unanticipated shift in the orientation of a majority of the United States Supreme Court or unless there is a constitutional revision. We will all have to live with them. But it should also be kept in mind that there still remains plenty of room for even more stringent restrictions on evidence, particularly if local judges lose confidence in their local police. As a matter of fact, it is my impression that the great majority of citizens, including lawyers and judges, do respect and support the police in the overwhelming number of instances. But it is very important that the official posture on the part of the police be that it is as possible for police to misconduct themselves or make errors in judgment as it is for any other collection of human beings, and that the wrongdoers and the inept will be dealt with as much in police agencies as they should be in other groups. This is probably the lesson to be learned when police review boards and the like are discussed. The danger is not that there will be external interference in the daily affairs of a police department; no outsider ever successfully affects the legitimate functions of a sizeable organization. Instead, the risk is that the adamant refusal on the part of police command officers even to discuss the problem or identify publicly the channels open to citizens with complaints will be treated as evidence that the police have something to hide, namely widespread misconduct. In the long run, exclusionary rule of evidence will not prove unbearable in any community in which citizens have confidence in their police; they can be devastating if judicial mistrust at the appellate level is compounded by dislike of the police at the local level.

Questions and Answers

B. James George, Jr.

QUESTION: Professor, do you feel that when there is a lack of a lineup and photographic evidence is used as a form of identification that this will eventually come under the same exclusionary rules as we have with lineup cases?

ANSWER: The *Stovall* v. *Denno* case stated that the lineup rule is not retroactive but that an unfair identification procedure violates due process of law. This means that if any proceedings the Court characterizes as having been unfair or rigged, produce identification of the defendant or the suspect by the complainant, there is the danger that at a later date the Court could say this tainted the identification, which in turn tainted the witness' testimony so that it should be excluded.

I would strive for fairness as much as possible. In a lineup in which the complainant has said that the suspect is a Negro and officers array one little Negro and four tall white policemen, that is suspicious. By the same token, it seems to me that if the initial report identifies the criminal as a Negro and police show the complainant photographs of one Negro and four whites, they build in distortion. Both of these means of distortion may well be picked up by the United States Supreme Court as being basically unfair and unconstitutional; then the witness will not be able to testify to the fact of identification.

QUESTION: Under the claim of privilege could someone required by a one-man grand jury to produce his records and documents, resist by claiming privilege, and if so who makes the decision?

ANSWER: Courts cannot use their process to force a citizen to incriminate himself either through his courtroom statements or through the production of his records, papers or documents. Therefore, if a circuit judge sitting as a one-man grand jury issues a subpoena to a citizen requiring him to produce his papers or records, the citizen can refuse, yet the judge can cite him for contempt. One might say that there should be a hearing as to whether the material sought will or will not incriminate the citizen. However, the way the United States Supreme Court has laid down the ground rules of privilege the unsubstantiated claim itself is valid.

QUESTION: Are you stating that in the future the lineup will actually take place in the presence of a judge, jury, or defense lawyer? Also, in identification cases where it is impossible for the suspect's own attorney to be present for a week or so, couldn't this delay weaken the possibility of identification?

ANSWER: The United States Supreme Court has not as yet defined enough of the details concerning lineup practice to allow us to say that

the only safe way to conduct a lineup is in front of a judge, jury or lawyers. A suspect who has not been formally charged in an information preliminary examination must be given specific warnings so that he understands he does not have to have the lineup conducted without a lawyer present. The Court does not say that he has a right not to participate in a lineup. The officers should also inform the suspect that he may, if he wishes, dispense with this requirement that is, waive it. These are the only requirements directly set up by the Court.

The Supreme Court stated in the *Wade* opinion that if the suspect has an attorney who refuses to appear at the lineup, it might be possible to appoint a special attorney for the limited purpose of the lineup. If a community has a legal aid operation or a bail release program, under which a lawyer interrogates the suspect to determine whether he should be released on bond, it may be possible to ask one of these attorneys to be present at the lineup.

If a suspect has been charged by information and his attorney will not appear for the lineup, then I would explore this alternative counsel approach. However, if the suspect has an attorney I would never resort to substitute counsel until I had tried to have the man's own attorney appear within a reasonable period of time.

QUESTION: Can you place a suspect in a lineup if he physically refuses to participate? This question anticipates having to drag a suspect into the lineup, and thereby jeopardizing the "fairness" of the lineup. How do you get around this problem?

ANSWER: On the technical legal side, the United States Supreme Court in the *Schmerber* case (blood testing) and the *Wade* and *Stewart* cases (handwriting examples, voice specimens) seems to have said that the privilege against self-incrimination does not cover things that are done to or with the defendant's body unless the activity enters the area of extreme cruelty, where the *Rochin* case (stomach pumping) might come into play.

The United States Supreme Court, therefore, has stated that the defendant has no choice as to whether the lineup will or will not be conducted. The defendant merely has the right to insist that his counsel or another attorney be present when the lineup is conducted.

I think, however, that the officer's own reaction to the validity of the lineup is the key question. If, as a police officer, one concludes that the validity of the identification by the complainant could be considered as dubious under the circumstances, he can presume that a judge will be about twice as dubious. Therefore, I repeat, do not carry out a lineup if the responsible officer has any doubts about the ability of the citizen complainant or informant to make an accurate identification.

QUESTION: Professor, you suggested that police officers photograph lineups. How would this affect the "fill-ins" who have not as yet been charged with a crime, and who after being acquitted, demand the return of all photographs and prints?

ANSWER: I would say, barring a statute requiring release of records, that there is no responsibility on the officer's part under any circumstances to release to a private person or to destroy police records. I am not aware of any existing statute or rule that affects lineup records. Therefore, I would say to keep them.

QUESTION: What would be your reaction to the provision of a printed waiver form that would allow a defendant to waive his right to an attorney at the time of the lineup?

ANSWER: I would handle this question of waiver of the right to an attorney at the lineup on exactly the same basis as a waiver permitting interrogation under the *Miranda* rule.

No signed waiver form ever gives an officer a 100% guarantee that the results of the interrogation will be admitted by a court. Nevertheless, the more officers can do to explain adequately the rights of the defendant or suspect under *Miranda,* and to record the circumstances, the more likely it is that a court will sustain the validity of the waiver.

I would apply exactly the same standards to the question of waiver for a line up until or unless we receive another explanation or more details from the United States Supreme Court in the future.

QUESTION: Can pre-indictment custody identification be done outside the police station, precinct, or headquarters?

ANSWER: The United States Supreme Court has really said very little that directly concerns what an officer is to do when a man is not indicted or has not had an information filed against him by the prosecuting attorney. I think I would proceed for the time being by analogy to the *Miranda* case.

As you know, the term "in custody or otherwise significantly deprived of his freedom" looms large in the way that courts are beginning to administer the *Miranda* decision. If it can be established that the suspect has not been put under any formal restraints, several state and lower federal courts have said that the *Miranda* requirements do not apply. However, if police have already placed a man under restraint and hold him outside a precinct house or police headquarters, they should advise him of his right to have an attorney present unless he waives that right. This is especially the course of action when the suspect is being viewed by witnesses at the scene of the crime.

Carrying this example one step further, if there is a large crowd milling about on the street and the officer's question, "Does anybody

know anything about who might have done this?" brings a response which designates the suspect, there is no *Wade-Stewart* problem, *yet.*

QUESTION: Would you have any suggestions to make on the problem of retained counsel? What can be done when the police want to hold a lineup, notify the defendant's attorney, and he either fails to appear or will not appear?

ANSWER: Unfortunately, there is no enforcible responsibility on the part of defense counsel to appear at the request of either the police officers or the prosecuting attorney.

I believe the United States Supreme Court reveals its naivete about the practices of attorneys both in *Miranda* and the new line up cases. The Court assumes that lawyers will not delay appearance simply for illegitimate purposes or to delay the proceedings.

However, if this becomes a problem, I would consult the local circuit court, or in the Detroit area, the recorder's court judges. Present the problem to them to see if they can help establish a roster of available attorneys both for *Miranda* interrogation purposes and lineup purposes. Possibly the judges and the Detroit Bar Association, together, could arrange for these attorneys. I believe some cooperation is available through these channels, but it might be well to see how this works out, to determine how many suspects want an attorney, and how many persons already represented benefit by the attorney's delay.

QUESTION: What procedures are considered acceptable in order to safeguard the identity of a confidential police informant?

ANSWER: The United States Supreme Court in 1967 said that there is no duty of the police to reveal the identity of an informant who supplied information relied upon by arresting officers, in *McCray* v. *Illinois.* The informant who can be a source of reasonable cause to believe that grounds for an arrest exist is protected, since the judge is no longer expected to require that officers reveal identity of an informant. It is possible that at the trial, if the defendant's rights to present the entire case to the jury are prejudiced, the prosecutor may have to choose between abandoning the prosecution or revealing the source of information. Yet, at this stage *McCray* v. *Illinois* gives officers more protection than they had prior to its rendering. Therefore, be prepared to make the statement in court that earlier leads from a particular unnamed informant have been accurate, and that in light of the information received in this instance events took place which led to placing the defendant under arrest. If officers testify in this manner the court will rule the arrest valid, and as long as the ensuing search did not exceed constitutional limits, the evidence is admissible and will not be suppressed.

QUESTION: If a consolidated motion is used at the pre-trial stage will the court allow the usual questioning of the validity of evidence throughout the remainder of the trial?

ANSWER: If the circuit court, on a motion to suppress, should sustain the admissibility of the evidence I would say the defense attorney loses his ability to argue the constitutional issue again to that judge or jury.

There is one exception, however. Even though a confession may be ruled constitutionally admissible, and thus go to the jury, there is still the common-law restriction that the statement must be worthy of belief. What one may find in the course of the trial proceedings, is that the defense attorney will again question the circumstances of the interrogation. If the prosecutor objects to this tactic the defense attorney is likely to reply that he is *now* advancing the question as to whether, under the circumstances of this interrogation, the jury should find the statement believable.

Since the constitutional rule governing exclusion of confessions is superimposed on the old common-law rule, there is no valid objection to the practice. If the defense attorney loses for the moment at the constitutional level he falls back on the evidentiary level.

However, these two strata do not exist on matters of search and seizure. A ballistic test run on the defendant's pistol will not be affected by the circumstances under which the gun was obtained. If the judge on the pretrial motion to suppress overrules defense counsel and states that the weapon and all derivative evidence is admissible, the prosecutor can successfully object to any defense effort to debate the details of the search in front of the jury.

QUESTION: How are the discovery practices under the criminal rules for the federal courts working, and would you anticipate similar practices in state courts?

ANSWER: I think the trend in discovery practice will be increasingly oriented toward the discovery of any materials in the prosecutor's possession which he can use in court. Defense counsel will be given increased access to this sort of material for purposes of preparation. However, these materials must be in the prosecutor's hands and usable in evidence in its existing form. This requirement protects most police department files, which are not admissible as evidence and therefore are not in the prosecutor's hands as potential evidence.

PROBABLE CAUSE FOR ARREST; PROBABLE CAUSE FOR SEARCH WARRANTS

by James R. Thompson*

It is my pleasure to be here at Michigan State University this morning and to be participating in this experimental tele-lecture program. Those of you in law enforcement know that Northwestern University School of Law has long enjoyed the position of working with, and for, persons in the law enforcement profession and we are proud that we have been called upon to participate in this conference.

The lecture today deals with an area of some difficulty — the description of what is probable cause for arrest and for the issuance of search warrants, and a description of some of the varieties of search incident to arrest and search incident to warrant.

I cannot really tell you what probable cause for arrest or for the issuance of a search warrant will be in every case. It is difficult to do that because it is a little like trying to describe colors. The difference between probable cause and suspicion, of course, is not the difference between black and white. That would be fairly easy to describe. In some cases it may be the difference between black and medium-black and if you should ask me whether or not you had probable cause in a particular case I would have to tell you, I can't tell you until I hear it, just as I could not tell you whether the color of your car was a black or purple-black until I saw it. I can give you the definition that the courts have used time and time again. It won't help very much, but since they seem to repeat it with some frequency you probably ought to know it, too. *Probable cause* is simply *the conclusion that can be drawn from facts which taken together would lead a reasonable police officer to believe that a crime had been committed and that a particular defendant had committed it.* That is as far as the definition goes.

Possibly an example would be the best means of demonstrating the difference between probable cause and suspicion. Suspicion is an inadequate basis on which to arrest a defendant, and probable cause is the necessary basis for arresting a defendant. One way to describe the differ-

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ence is to take a concrete case and we can use as an illustration a case, *Peters* v. *New York*,[1] which is pending in the Supreme Court of the United States and will be argued in December, 1967, involving the validity of the practice of stop and frisk. I will not go too deeply into stop and frisk since a later lecture in this series will deal specifically with this topic and field interrogation.

In the *Peters* case, a police officer was in his apartment. He had lived in this apartment for some 18 years and knowing all the residents his attention was attracted by a noise he heard outside of his apartment door. He walked over to the door, and taking a look through the peep hole, he could see two men tip-toeing down the hallway looking to the right and to the left at the various apartment doors. He thought that this activity was rather suspicious, so he went out into the corridor and at his presence the two men fled down a stairwell. Two flights down he was able to capture one of the men and he asked him what he was doing in the building, to which the man answered that he was visiting his girlfriend. The officer, knowing the residents of the building, said, "What's her name?" The defendant said, "I'd rather not say since she's married." At this point, his suspicions aroused, he frisked the defendant and he found what turned out to be an envelope full of burglar tools.

The defendant was convicted for the possession of the burglar tools and the question to be decided by the United States Supreme Court is whether or not the action of the officer in stopping, interrogating, and frisking the defendant was reasonable, it being conceded by everybody that probable cause for an arrest *did not* exist in that case. The officer had mere suspicion that a crime had been committed or was about to be committed. If stop and frisk is a reasonable, constitutional practice then suspicion is enough to stop, interrogate and, in some cases, frisk. It is clear that in that case there was no probable cause for an actual arrest.[2]

Now, the addition of one element might have made the difference between suspicion and probable cause. Suppose when the officer had looked out his apartment door, instead of seeing the men tip-toeing down the hall, pausing briefly, and looking at each apartment door, he had discovered them crouching in front of one of the apartment doors with one man as a lookout and the other man crouching over a lock. Even assuming that he could not see what the crouching man was doing to the lock, he would then have probable cause to believe that they were attempting burglary. So that depending on the facts of the particular case you may have probable cause or you may have suspicion. You may have the grounds for arrest or you may not. The addition of the simple thing

[1] 390 U.S.——, 88 S. Ct. 1889 (1968).

[2] On June 10, 1968, the Supreme Court, by a vote of 8-1, held that there was probable cause for arrest in the *Peters* case. Only Mr. Justice Harlan would have held that the facts justified only a "stop and frisk." Peters v. New York, 390 U.S. —, 88 S. Ct. 1889 (1968).

like a man bending over the lock instead of walking down the middle of the hallway may make the difference.

Based on this illustration you can see that if I were to try and define probable cause by giving you case examples I would have to talk about many, many cases. It is much easier, I think, for you to describe the situation to me and to have me give you my evaluation of whether or not probable cause existed. You will have a chance to do that in the question period.

You might inquire, at this point, what the actual importance is of having probable cause for an arrest. Suppose, for example, that you make an arrest and a search but you find no physical evidence. Would it really make any difference, in that case, whether your arrest was good or bad? So long as you did not turn up any physical evidence, what's the difference? The defendant is in custody — he is going to stand trial. We all know that even if an arrest is a bad arrest that does not mean the defendant escapes standing trial. His custody for the purposes of trial is legal, regardless of how legal or illegal the arrest was. You might say that, the existence of probable cause for an arrest is important only in cases in which the police find physical evidence of one sort or another in the search that they conduct, incident to the arrest.

Well, recent cases indicate that this narrow view may not be valid much longer. For example, those of you who heard Professor George's lecture last week heard him mention a case entitled, *Wong Sun* v. *United States*.[3] *Wong Sun* seems to indicate that the Supreme Court, if it has not already done so, is ready to announce a rule that a confession taken during the course of a search made without probable cause is subject to suppression. So that, even if physical evidence during the course of the search is not found, if the defendant happens to make an admission or confession, and putting *Miranda*[4] aside for a moment, while the police are on his premise unlawfully because they had no probable cause to make an arrest or a search, the confession itself can be suppressed.

It also follows that if a confession which is taken during the course of an unlawful search can be suppressed, a confession which merely follows an unlawful arrest can be suppressed. So that, if your arrest is not based on probable cause, if it is unconstitutional, not only will physical evidence be suppressed but any confession or statement taken after the arrest will be suppressed.

And, now with the recent lineup cases, *Gilbert* v. *California*[5] and *Wade* v. *United States*,[6] it may be argued with some success that any identification made during the course of a lineup or showup which

[3] 371 U.S. 471 (1963).
[4] Miranda v. Arizona, 384 U.S. 436 (1966).
[5] 388 U.S. 263 (1967).
[6] 388 U.S. 218 (1967).

follows an unlawful arrest must be suppressed in the court, on the ground that the identification is the product of a lineup process which followed the defendant's being taken into custody on an unlawful basis and that, but for the unlawful arrest, the defendant would not be in the custody of the police for the purposes of the lineup. Now how far you can carry this argument I do not know at this point, but it is well to keep in mind that there is a great importance in arresting a defendant on probable cause even if it means a delay in arrest, even if it means a little bit of extra work or investigation, because the consequences of a bad arrest may simply not be the suppression of physical evidence but may be the suppression of admissions or confessions or even a lineup identification, as well.

While we are on the subject of lineups, let me say a few words about the *Gilbert* and *Wade* cases. Though these lectures are directed to the law of arrest, search, and seizure, and the lineup cases are technically not a part of it, I know there is a great interest in the police community on the subject of what is going to come in the wake of these lineup cases and how lineups ought to be conducted. Professor George dealt with this area, in at least some detail, last week, and since I disagree with him on a couple of aspects I thought I would mention here my views on the proper conduct of lineups following the *Gilbert* and *Wade* cases.

Professor George first indicated that the court had not yet dealt with a case in which the defendant was put in a lineup before indictment and before he got an attorney, and that is true. The *Gilbert* and *Wade* cases both involved defendants who had already been indicted and defendants who were already represented by counsel. The defendants found themselves in much the same position as the defendant in the *Escobedo* case,[7] who was already represented by counsel at the time he was taken in for interrogation. And, you will recall that in *Escobedo* the court first limited its rule on counsel at the interrogation to those cases in which the defendant was already represented by a lawyer. It was not until two years later, in the *Miranda* case, that the *Escobedo* rule was applied to everybody taken into custody, whether or not he was indicted and whether or not he was then represented by counsel. I assume that the same rule will be followed in the *Gilbert* and *Wade* cases. That is, that a defendant has a constitutional right to a lawyer at a lineup regardless of whether the lineup takes place before or after indictment, and regardless of whether the defendant is represented or unrepresented by counsel.

And, I assume that it will not take the Supreme Court of the United States two years to make that clear, as it did in the confession cases between *Escobedo* and *Miranda*. I doubt very much whether many of the state supreme courts will try and escape the holding of the *Gilbert* and *Wade* cases for two years, as they tried to escape the holding of the

[7] Escobedo v. Illinois, 378 U.S. 478 (1964).

Escobedo case, by saying that it took a request for counsel to make the right of counsel effective. If you are concerned about the validity of your present showup, lineup, or pre-trial identification processes you ought not to take any comfort from the fact that you may be dealing with a defendant who has not yet been indicted, because the defendants in the *Wade* and *Gilbert* were under indictment. I do not think that fact makes any difference.

Professor George also indicated that in addition to giving *Miranda* warnings to persons in the lineups, defendants in lineups also ought to be given warnings which told them of their right to counsel during the lineup. This is, of course, sound advice. If a man has a right to a lawyer at the lineup he must be told of that right under the rationale of *Miranda.* But, there is one danger here of which you ought to be aware. We know from the *Miranda* and the *Schmerber* cases[8] that the defendant's participation in a lineup or interrogation may differ according to whether or not the Fifth Amendment governs his conduct. For example, if you are merely interrogating or questioning a defendant there is no doubt that the Fifth Amendment applies — he has all the right in the world to refuse to answer your questions. On the other hand, if you are asking him, for example, to put on a hat or coat, to walk in a certain manner, to give a handwriting sample, or to speak for voice identification, the *Schmerber, Wade,* and *Gilbert* cases all hold very clearly that the Fifth Amendment does not protect the defendant under those circumstances and that he must put on the hat and coat, walk, give a handwriting sample, or give a voice identification sample, and his refusal to do so cannot be based on the Fifth Amendment.

Now, suppose you are trying to get both kinds of evidence from a defendant. That is, you are interrogating him for the purpose of getting an admission or confession; at the same time you are asking him to give a voice sample. He has the right to refuse to give you one but he does not have the right to refuse to give you the other. What kind of warnings should you give him? Well, you can not very well give him only the *Miranda* warning, which tells him he need not speak and that anything he says will be used against him, and at the same time expect to get a voice sample from him, because he is privileged to refuse to speak for the purposes of confessions but he is not privileged to refuse to speak for the purpose of the voice sample. So, you either have to give him a double-barrelled warning or do it separately. My advice, of course, is to do it separately because by the time you get through giving him a double-barrelled warning, telling him that he does not have to talk for the purpose of confession but that he has to talk for the purpose of the voice sample, both you and he, and later on the prosecutor, judge, and trial lawyer would be so confused about what warnings were given and what

[8] Schmerber v. California, 384 U.S. 757 (1966).

he understood and what he did and what he was supposed to do that the case would be hopeless. So, it is a good practice, when you are dealing with a defendant in a lineup or showup, to first get the matter of interrogation out of the way, and then get to the matter of voice identification or handwriting samples, and not try to do all of those things in one process because to do so requires a double-barrelled, contradictory warning to the defendant and you may taint your evidence if you try to do that.

The third point that was touched on by Professor George was the fact that he assumed, as did the court itself in the *Wade* and *Gilbert* cases, that the right to a lawyer at the line up could be waived in the same fashion that the right to a lawyer at interrogation could be waived. And he recommended, therefore, giving the defendant the warning of his right to a lawyer at a lineup and soliciting a waiver from him, preserving that waiver apparently in the form of writing, and then conducting a lineup in the absence of counsel which the defendant has just waived. It is true that the Supreme Court in the lineup identification cases said just that, that the right to a lawyer in the lineup cases could be waived in the same manner that the right to a lawyer in the interrogation cases could be waived. I doubt very much whether that will continue as good law. And, I think, it is useless for police officers to try and get a waiver from a defendant in a lineup as far as his right to counsel is concerned.

It seems to me there is a very fundamental difference between your right to a lawyer at interrogation and your right to a lawyer at a lineup. The right to a lawyer at the interrogation stems from the fact that a lawyer can make effective a defendant's Fifth Amendment privilege, that he can tell a defendant that he need not speak, and that if he does speak whatever he says will be used against him. Well, this really reinforces what the police officer tells him in the warning. The defendant who is ready and willing to confess may be assumed to know whether or not he is in custody which is "inherently coercive" and which would make his statements involuntary. And, if he feels like confessing he can do so after he receives the advice about a lawyer. But, the reason the Supreme Court said you are entitled to a lawyer at a lineup is entirely different. The Court said that some lineups, as they are conducted today, are inherently untrustworthy. They stated that we do not know what suggestive influences are at work out in the audience part of the room when the defendant is up on a stage, often times under lights where he cannot see out into the audience. Sometimes when the identification is being conducted through a one-way mirror he does not even know if somebody is in the audience. The purpose of having a lawyer at the lineup is to have an independent witness for the defendant as to just what goes on.

The Supreme Court said that the reason the lawyer was needed at the lineup to see what goes on is that often times the defendant himself

could not tell what was going on. Well, it seems to me that if a defendant needs a lawyer at the lineup, so that at the later trial he knows what went on, and is in a better position to cross-examine the identification witness, it is inconceivable that he could waive his right to a lawyer because then he's left in a position of fending for himself without the ability to do so. And, though a defendant under interrogation can fend for himself, if he wants to confess, a defendant in the lineup process who cannot see what is going on during the entire lineup process cannot do so. So I doubt very much if the Court will adhere to that language about being able to waive a lawyer at the lineup, which leaves police departments with only two alternatives: furnishing a lawyer at every lineup or reforming lineup practices so that we know what goes on without the necessity of having a lawyer there. My advice to you would be to ignore that part of the Court's decision which says, in effect, that you can warn the defendant of his right to a lawyer at a lineup and get a waiver from him. I do not think that will stand as good law for very long.

Going back to the subject of probable cause, there are a series of Supreme Court of the United States decisions which illustrate the cases in which probable cause has been found for arrest and one case in particular which illustrates when you do not have probable cause. We ought to take that one first, I think.

The case of *Beck* v. *Ohio*[9] demonstrates what too often happens in our courtrooms. A police officer goes out and makes an arrest. He conducts a search. He finds the material he is looking for. He goes to trial. There is a hearing on a motion to suppress. He testifies, and for one reason or another, all of the facts known to him about the arrest and search are not brought out in the record of the trial. The defendant is convicted. The case goes up and the prosecutor is stuck with a record which hints that there was probable cause for the arrest and search, but because the police officer has not told the entire story the Supreme Court is forced to find that there was no probable cause.

In the *Beck* case, the police officer, a member of the Cleveland, Ohio Police Department, stopped the defendant who was driving around Cleveland in his automobile. He searched him, found nothing, took him to the station, and found policy slips inside his sock. At the hearing on the motion to suppress all that appeared was that the police officer knew the defendant by sight — he had seen a picture of him. He knew he had a prior record for gambling offenses and that somebody, some unknown informer, had told him something on a previous occasion. He did not identify the informer. He did not tell the court what the informer said, although the inference was that the informer said "This defendant is a policy runner and he'll be found at this location, on this date, driving this car." And, if the officer had simply related that to the court probable cause would have

[9] 379 U.S. 89 (1964).

been established. But the officer's testimony was too brief. The Prosecuting Attorney did not bring it all out. So the Supreme Court was left with the record in which it appeared that the officer knew something from somebody. The inference was that the informer told the police officer that the defendant was a gambler but that was not in the record. The Court said that when you have a case where the police officer knows simply what the defendant looks like and that he has a previous record for gambling that is not sufficient probable cause to stop and arrest him, because if that were probable cause the police would have the authority to arrest anybody known to them who had a previous criminal record.

On the other hand, the case of *Draper* v. *United States*[10] is now a classic case of probable cause for arrest, especially, in narcotic cases. *Draper* illustrates the principle that even where the arrest is based on the hearsay of an informer, whose identity is being kept secret, probable cause can be found. In the *Draper* case, a special employee of the Federal Bureau of Narcotics of Denver told the agent that the defendant had been selling narcotics in the Denver area for six months, that he got his supply in Chicago, that he had left for Chicago by train several days previously, and that he would be coming back from Chicago on a particular train at a particular time. The informer said that he would be dressed in a particular manner in a raincoat, he would be bringing back heroin from Chicago, and that he would be walking very fast when he got off the train. The agent went down to the train station. The train pulled in. The defendant got off the train. He was dressed in the manner the informer described, he was walking very fast with his hand in his raincoat pocket. He was intercepted and arrested and heroin was found in the pocket.

The Supreme Court of the United States said, first that it does not make any difference that the arrest was based on the hearsay word of the informer because hearsay can form part of probable cause. And, secondly, the hearsay in this case was reliable because the officer witnessed that which the reliable informer, several days earlier, had told him he would witness. So in the *Draper* case you have the word of the informer, which by itself might not be enough because he was not identified; you have the officer's assertion that the informer had been proved reliable on past occasions, that added a little more corroboration; and you had the officer's testimony that the information given him by the informer checked out: he saw exactly what the informer said he would see.

The same is true with a recent case decided by the Supreme Court of Illinois. The case held that the informer's identity in probable cause cases could be kept secret and we will deal with that in discussing the *McCray* case[11] in greater detail in next week's lecture. But in the *McCray* case the pattern was similar. The question was whether or not the word of the in-

[10] 358 U.S. 307 (1959).
[11] McCray v. Illinois, 386 U.S. 300 (1967).

former was reliable. And the court leaned very heavily upon the fact that the officer's testimony showed that the informer had been reliable in the past. In fact, the informer was so reliable that the officers were able to testify that his previous information had lead to a number of arrests and convictions and they named the cases in which the convictions had occurred.

Let us pause for a moment at this point and examine very closely just how it is you corroborate the story of an informer, and at this point it makes no difference whether we're talking about an arrest without a warrant or whether we're talking about an application for a search warrant, because the principles are the same. Suppose that the probable cause for your arrest or search is going to be based on the word of an informer. If you do not mind identifying or "surfacing" the informer there is usually no problem because then you would not even have to deal in hearsay. The informer himself will make the application for the search warrant and he will tell his story and sign his name — that is probable cause. But suppose the informer's identity is to be kept secret, which means that the police officer has to sign the application for the search warrant and the informer's story has to be relayed through the police officer. That makes the informer's story hearsay and means that in order to form probable cause it has to be corroborated in some manner. There are a number of ways to corroborate the story of an informer and it is not necessary in every case that an informer be reliable or that the police officers describe him as previously reliable. For example, simple surveillance or investigation can provide independent facts which will establish the reliability of the informer.

When I was in the State's Attorney Office in Chicago we had a case involving a "floating" gambling operation. The informer told the police officers that the gambling operation was currently located in a business office. The business office was labelled with the address of Acme Importing Company. Of course, all the windows were painted black and you could not see inside and the door was locked. And, the police officers really had little more than the fact that the informer had told them that the floating crap game had finally come to at least a temporary stop at this location.

Well, there was some question about the reliability of the informer and some of our local trial judges in Chicago were starting to look with raised eyebrows at "previously reliable informer" cases because they were getting a whole slew of them. So, we determined that if we could corroborate the story of the informer by any other means, other than by describing him as previously reliable, we would have a much stronger case. Well, how could we do that? I asked the officers what kind of investigation they had made of the informer's story and it turned out that they had done very little. We assumed that if this was indeed a true importing

company they probably got mail. They probably got some mail from overseas. They probably got mail which would indicate that they were at least in the import business. So the officers, instead of getting the search warrant that day as they wanted to do, went back and conducted a surveillance for a week or so. And, each morning they would check with the post office. They found out that Acme Importing Company got no mail. Or if they did get mail it was junk circulars, none of which came from outside the country. So that was a factor which raised some suspicion. If this was really an importing company they ought to have gotten mail which would indicate that that was the nature of their business, but they did not.

The officers also talked to other businessmen in the neighborhood. Did they ever see the owners or the office manager or any employees of Acme Import Company? Did they eat lunch in the neighborhood? Had they ever talked to them? They talked with the mailman to find out if he had ever talked to the people or whether he had ever seen activity inside of the place. And, all of these inquires proved negative. Again, an indication that if this was a legitimate business it certainly was not being conducted in the manner that a legitimate business would be conducted. If you have a laundry running in the neighborhood or a cigar stand, or a dry goods store, or something of that nature the other businessmen in the neighborhood know something about it and know something about the people that run it. But nobody knew anything about the people who ran the Acme Import Company. This, plus some other information from another informant, we thought was sufficient to corroborate the story of the anonymous informant and on that basis the search warrant was issued without even dealing with the reliability of the informant and it was later sustained.

In addition, it may be that you can find corroboration of an informant's story in the fact that other informants have told you the same story. Or you can find corroboration in the fact that the defendant may have a prior criminal record or a reputation in this area. The defendant is a known addict, or a known seller or a known gambler. That knowledge and that reputation go to establish probable cause and go to make up additional elements of corroboration. But, suppose investigation or reputation cannot be used in a particular case and you are stuck with only the informant's story. Then you have to convince the judge issuing the warrant that he is reliable.

It no longer is sufficient, after the case of *Aguilar* v. *Texas*[12] from the Supreme Court of the United States, for the officer to simply tell the judge in his application for a search warrant that the informer has previously proved to be reliable or that the officer knows the informant is reliable. Why is this?

[12] 378 U.S. 108 (1964).

The whole purpose of establishing probable cause, either for an arrest without a warrant or in an application for a search warrant, is to have the officer supply the facts and let the judge draw the conclusions. When you short circuit that process by telling a judge, either on a search incident to an arrest or on an application for a search warrant, that you think the informer is reliable, or that you know that the informer is reliable, you're doing both his job and your own. This leaves him with nothing to do but gauge *your* credibility and *your* opinion. Therefore any application for a search warrant, any testimony on a hearing to suppress an arrest or a subsequent search, which merely rests upon the foundation of an officer characterizing the informer as reliable, or previously reliable, is no good.

Under a recent Supreme Court of Illinois decision, which I think is probably correct, it is also insufficient for the police officer to say that based upon this informer's story we have made arrests in the past. Why? You say that sounds like a statement of fact, that doesn't sound like a conclusion. This informer has to be reliable if the police in the past have acted on his story and made arrests. The reason that kind of allegation is insufficient is because it shows no more than that the police acted. It does not show what the results of that action were. You could have a bum informant who never told you a single true story in his entire dealings with you and you could have made an arrest every time based on what he said and found nothing. So, the fact that you made an arrest or made a search in the past based upon what an informer told you does not go to show that he is reliable.

Now, it is clear after the *McCray* case that if you are able to say that in the past this informer has furnished information to you which has led to the arrest and conviction of particular defendants that will establish reliability. *Conviction will always establish reliability.* The courts have not yet said that conviction is the only way you can establish reliability and obviously they will not go that far because there are a number of elements which go to make up the question of whether or not a defendant will be convicted aside from the evidence turned up. Maybe he was not convicted because the jury blew it. Maybe he was not convicted because the jury was not convinced beyond a reasonable doubt; the prosecutor improperly tried the case; or the case went out on some legal defense, or entrapment or something of that nature that would still leave the informer's original story untouched and credible. But what you want to say in these cases of corroborating an anonymous informer is that you know he is reliable because in the past based upon his information a search was conducted and heroin was found, or gambling apparatus was found. That shows not only that the police acted, but that the police acted and found what the informer said they would find. This goes to show the reliability of the informer. Not being content with merely concluding that an informer is reliable in your application for a search warrant, or in

search incident to arrest, is but an illustration of the general rule that police officers should always state facts in their search warrant applications, never conclusions. And tell everything you know.

When we get into the question of your right to search vehicles after a traffic arrest, next week, this rule again becomes especially important. We know that police officers do not search the person of the driver and the vehicle in every traffic arrest they make. They search only for good reason, when they are suspicious. They are suspicious of weapons, they are suspicious that the car is carrying contraband, they are suspicious that these people may be burglars. The trouble is that in many of these cases the officer, when he gets on the stand to testify at the hearing on the motion to suppress, does not translate into testimony the reasons which impelled him to make the search. The same is true in making an application for a search warrant. Everything should be put in a factual manner and not in a conclusory manner.

In the area of search incident to an arrest, there are some mechanical rules of which you ought to be aware, in addition to the basic rules of when a search warrant may be issued or when a search may be made. How wide-ranging may the scope of a search incident to an arrest be? What are the physical limitations? If you arrest the defendant in his apartment, can you search the room in which the arrest is made? Sure. If the arrest is made in the living room can you search the kitchen? Sometimes. It all depends. The rule that will guide you is — why is a search incident to an arrest made in the first place? Searches incident to an arrest without a warrant are allowed for three reasons. The first is to find weapons, to protect the officer from attack during the arrest process. The second is to find weapons or other instrumentalities of escape which will foil the defendant's escaping from the custody of the law during the arrest process. And the third reason is to find evidence of the offense for which the arrest is made. As we will see next week, when we talk about search incident to traffic arrests, if any of those three reasons are not present in a particular case a search incident to an arrest cannot be made even if a lawful arrest has been made.

Suppose you arrest the defendant in the living room. It is clear under the three previous conditions that you can search the area immediately surrounding him for weapons or instrumentalities of escape — which would mean the living room. You probably cannot go into the bedroom or the kitchen to search for weapons, especially if the defendant is not going to have the opportunity to go into those rooms. On the other hand, if you also have in the case an offense for which a search for evidence can be made, (the possession of narcotics or the sale of narcotics for example) what you are looking for is his supply. It is clear also that your search for the narcotics supply is not limited to the room in which the arrest was made, but can extend throughout the apartment. Sometimes in the case

of arrest in dwelling houses or one or two story houses the search can be pretty far-reaching, especially in contraband cases or possession cases. If you are arresting the defendant for possession of stolen property and you are looking for the stolen goods, you do not have to stop with the room in which the arrest was made; you can search the entire house. However, if you do not have a reason to search the house or the rest of the apartment for evidence, a search which goes beyond the immediate area of the denfendant, or which goes beyond a weapons search, will be a bad search.

How long after the arrest can you search? Well, here again the courts are split, depending upon what reason for which the search is being made. If the search is strictly a weapons search and the defendant has been taken into custody, in fact, has been taken out of the apartment and down into the police squad car or off to the station, a further search for weapons or means of escape would be foolish. The defendant is not in a position to escape or is not in a position to harm the officer. So, you cannot continue searching the house for weapons. Just as when you make a traffic arrest, and you are searching for weapons and you have already taken the defendant out of his car and put him in your squad car you cannot very well claim to a court later that you continued to search his car for weapons because he is not in the vehicle any longer. However, if the search is for evidence of the crime for which the arrest is made, the cases hold that the search for the evidence may go on even though the defendant has been removed from the scene.

What can you search for and seize? Here, again, the scope of the search incident to an arrest may be limited depending upon what it is that you are looking for. The general rule is that you may search the room in which he is arrested, and, depending upon the circumstances, the rest of the apartment or house. If, for example, you were looking for stolen television sets you could not look in the defendant's desk drawer or strong-box up on the closet shelf because you would not expect to find a television set that stood three feet off the floor in a desk drawer that measured 5"x7". So even though the desk drawer was in the same room where the arrest occurred, and normally you would be permitted to search anywhere in that room, if the material for which you are looking could not possibly be found in the place in which you are looking, your search is bad. If you were looking for stolen television sets and you went through the defendant's desk drawer and turned up narcotics, the narcotics would be suppressed.

On the other hand, if what you are looking for is small and capable of concealment any place in the area you have the right to search pretty thoroughly, and if during the course of that search you turned up material which was not what you were looking for, but which was obviously contraband, you would have the right to seize it because your original search for the material that you are looking for was lawful.

Police officers ought to be particularly careful in their search warrant description of the things for which they are looking. And, depending upon the material they are looking for, the description may have to be pretty specific, while in some cases it can be fairly general. For example, in contraband cases when you are describing narcotics and gambling apparatus, your description in the search warrant does not have to go very much beyond that. "Gambling apparatus" is a pretty good description. When discussing gambling wheels, slot machines, things of that sort, the description does not have to be any more detailed than that. "Narcotics," "heroin," "marijuana" – it does not have to be any more detailed than that. When you are talking about stolen property, for example, which you might expect to find in almost any location in which you make a search, your warrant must be detailed and treated very carefully. If, however, you fail to be this precise you might find the courts saying to you, "Well, Mr. Police Officer, if you took this warrant into my house you would find a 'fur coat' or a 'television set' and this warrant would have authorized you to seize that." And, if it does so the warrant is invalid.

The United States Supreme Court has pretty much upset the use of search warrants in obscenity cases and most prosecutors who work in obscenity to any great extent have just about abandoned the use of the search warrant because of the peculiar requirements with which the Court has surrounded the obscenity search warrant. In two cases, *Marcus* v. *Missouri*[13] and *Quantity of Books* v. *Kansas*,[14] the Court has set the following rules concerning the issuance of a search warrant and these have just about demolished the use of search warrants in obscenity cases.

First, the books that are to be seized must be particularly described by title and author. The judge who issues the search warrant must have read the books prior to the time that he issues the search warrant. It is not sufficient for a police officer to take the books, bring them into the judge, and say, "Judge, I think these are obscene." The judge has to read them and come to a finding that there is probable cause to believe that they are obscene because *he* read them. The books by their title and author have to be specifically set out in the search warrant and the police officer cannot seize books that are not named in the warrant whether he thinks other books are obscene or not. It may be that this rule does not apply to what we call hard-core pornography cases. If an officer armed with an obscenity search warrant naming a particular book by title and author stumble across 8″x10″ glossies of persons engaged in sex acts most people would agree that those were obscene, and the officer could probably seize those as contraband without a warrant. When dealing with books and magazines, if they are not in the warrant you cannot take them.

[13] 367 U.S. 717 (1960).
[14] 378 U.S. 205 (1963).

The real determinant was the *Kansas* case which said that even before a judge could issue an obscenity search warrant there has to be an adversary hearing to decide the question. That is, the defendant has to be notified that the State thinks certain books on his premises are obscene and would he please come into court and litigate that issue before the search warrant can be issued. Only after an adversary hearing at which the defendant is present and represented by a lawyer, and the judge comes to the conclusion that the books are obscene, can a search warrant be issued. What will happen by the time that issue is decided? The books will be long gone. What is the point in having a search warrant issued? Most prosecutors these days are relying on purchases of books in the obscenity field and using the books that they purchase as evidence, rather than relying upon the use of the search warrant to seize the defendant's entire stock.

There is probably only one escape from the ruling of these cases in the obscenity field. In both of the cases that I have mentioned, the *Marcus* case and the *Kansas* case, the search warrant called for the seizure of all copies of the books that were named in the warrant. And, it was because of this, that the Supreme Court was particularly critical when it said, in effect, that the police were using a criminal tool, the search warrant, as a tool for the suppression of books. It may be, for example, that you could issue a search warrant to seize one, two, or three copies of a particular book without having an adversary hearing. So, that if a defendant had a hundred copies of a paperback book entitled "Orgy Club" in his store, and you got a search warrant to seize three copies of the book, that warrant might be valid. But, under the *Marcus* and *Kansas* cases if you seize all copies of the book and you have not had an adversary hearing a search warrant is no good.

The descriptions of the premises to be searched in search warrants ought to be carefully attended to, especially, when you are dealing with apartment buildings in which more than one resident is situated. Put on the apartment number; in those cases where you know the name of the occupant but there is no apartment number put in the name of the occupant of the apartment; in those cases where there is no number and you do not know the name, describe where in the building the apartment is located — not just in the rear, but in the rear on the left hand side — not just on the second floor, but in the rear, or in the front, or in the middle, or wherever it is; and include any description that will help the judge to identify the particular apartment in question, even if you have to describe the shape and size of the door.

In other words, the more nondescript the apartment is, the more you will have to exercise your ingenuity in describing that apartment.

Can you seize property not named in a search warrant? That depends. Suppose you have a search warrant authorizing you to search for and seize

narcotics and you are searching the defendant's apartment pursuant to the search warrant and you come across gambling apparatus. Can you seize it? Yes. Why? Because your presence on the premises is under the authority of the warrant and your presence on the premises is, therefore, lawful because you were conducting a good faith search for narcotics and it makes no difference that what you come up with is not narcotics but something entirely different.

Now, there was a recent case in Michigan, which seems to approve the practice of police officers, when finding something not named in a warrant, but on the premises, sending an officer for a second search warrant. This is a cautious and conservative step, and if you have the time and the facilities to do that it is fine. However, I do not think it is necessary under the Constitution. I think, if you are lawfully on the premises to begin with, and you are conducting a good faith search for the material named in your warrant, and you come across other contraband you are entitled to seize that and use that as evidence without the necessity of issuing a second search warrant.

Suppose, for example, that your search warrant described a particular piece of stolen property and you started your search and you found it. At that point your authority to be on the premises ends. You could not go on searching, and if you later found narcotics, do not hope to use those narcotics in a prosecution for their possession, because by the time you found the narcotics your authority on the premises had ended and your search would be bad.

The same would be true, for example, if the defendant had given you consent to search for a particular item. Once you found the item the consent ends and your authority ends. So here the rule simply is, that if you are engaged in an otherwise lawful search and you come across material which is seizable, you may seize it, but if your authority was wrong in the beginning the fact that you turn up evidence of other crimes will not help you. In most cases, or in all cases, it has been my experience, in practice at least, *not* to return these other items which you find which are not named in the warrant, *on the return of the search warrant.* If your search warrant is for narcotics, for example and you find gambling apparatus you are not seizing the gambling apparatus because the narcotic search warrant gives you the authority to — it does not. You're seizing it without warrant because you are lawfully on the premises. When you return a narcotic search warrant you should not list on the back the gambling apparatus found pursuant to the execution of this search warrant.

Questions and Answers

James R. Thompson

QUESTION: Would you define the word "contraband"?

ANSWER: "Contraband" is a word of art that we use to describe generally that which it is illegal to possess. Narcotics are contraband. Stolen property is contraband, for example, a stolen television set. Ordinarily it is not unlawful to possess a T.V. set, but it is unlawful to possess stolen property. The same is true of gambling apparatus, materials used to print counterfeit money, or a weapon (under certain circumstances). If, for example, an individual is an ex-felon and the laws of his jurisdiction say that an ex-felon cannot possess a weapon, the weapon would be contraband.

QUESTION: Could a search incident to an arrest for possession of stolen goods be made if for example, the prosecutor had refused to authorize a search warrant to seek these stolen goods?

ANSWER: As a general rule the police officer has the right to make a search incident to an arrest to find evidence of the crime for which he is arresting. This assumes that you have some probable cause to believe that the goods will be found at that location.

If, for example, you arrest the defendant in his house and have no reason to believe that the goods would be found there you can not search. In other words, if you have reason to believe that the goods are somewhere else other than at the location of the arrest, obviously you could not seek to justify an incidental search on the grounds that you were searching for the goods. The limitation that must be assumed in all these search incident to arrest cases is that there must be reason to believe that the goods for which you are searching are at the location where you are making the search.

QUESTION: What are the legal aspects of a face-to-face lineup between the defendant and a witness?

ANSWER: Although the United States Supreme Court in the *Gilbert* and *Wade* cases was talking about actual lineup incidents, there is some reason to believe that the Court would apply its rules to almost any type of pre-trial identification procedure. This process may include a single face-to-face meeting between the suspect and the victim which might include having the victim pick out a picture of the defendant from a number of pictures, while the defendant is not even present.* In addition, there might be the confrontation of victim and suspect immediately after the crime. This practice is going to lead to some problems.

* In *Simmons* v. *United States*, 88 S. Ct. 967 (1968), the Supreme Court excluded the particular photographic identification involved from the *Wade-Gilbert* rules. —Ed.

Take, for example, a rape case in which a police officer on patrol passes an alley and the victim runs out. Her clothes are torn, she is bloody and disheveled but is able to state that she was just raped and the man is going down the alley. The police officer cruises the block and finds a man who is running. The officer brings the man back to the victim and there they are – the police officer, victim, and suspect, in an alley at 2:00 in the morning. There is no lawyer there and the likelihood of getting one is slim, yet the officer is really conducting a pre-trial identification.

The United States Supreme Court might well hold that this type of pre-trial identification process could not be conducted in the absence of counsel since the police officer only presented one man, the victim had too little opportunity to observe the defendant at the time of the act, or because the procedure of bringing the suspect back shortly after the crime and he being the only man around, might induce an improper identification.

Justice White, in voicing his dissent in the *Escobedo* case, hinted that lawyers would be riding around in squad cars. We may be closer to this situation than we realize; yet I foresee some very severe problems with pre-trial identification processes, other than the lineup or showup techniques.

QUESTION: You have stated that while talking to a suspect in his living room, and knowing that the contraband would be in the garage, you could not search or take anything out of the living room. However, if you did see narcotics or gambling devices while questioning the suspect in the living room, would it be proper then to take this contraband?

ANSWER: Yes, you could take this contraband if it were out in the open, and if you saw it during the time in which you made the arrest without searching for it. In this case the courts would hold that no search had taken place since the contraband was in plain view and the officer is entitled to seize it.

In some house-garage cases the courts have held that the garage can be included within the scope of the search incident to an arrest, so that even if the arrest took place in the house the garage might be included within the scope of the house and you could search it without a warrant. Other courts have extended the area of search incident to arrest to a car parked in the drive-way. Some courts have not so held, but in these cases the most difficult job is determining where to draw the line.

The farther away you get from the original site of the arrest the more your search may be in jeopardy. However, objects which are in plain view, and are not discovered as a result of searches, may be seized without worrying about whether you have the authority for such a search.

QUESTION: What happens if a defendant absolutely refuses to give a

handwriting sample, even though the Fifth Amendment gives him no right to refuse?

ANSWER: The Supreme Court of California states, and I assume that most courts, including the U.S. Supreme Court, will follow this lead that if the defendant is not protected by the Fifth Amendment in refusing to give a handwriting or voice identification, and it is clear that he is not protected from refusing to do so, the fact the he refused to give this source of information is in legal effect an admission of guilt. At the trial it would be competent to prove that the defendant refused to give a handwriting sample or voice identification and the prosecutor could comment on that refusal.

It is clear that if the defendant refused to speak for the purposes of giving a confession or admission of guilt he is protected by the Fifth Amendment. It would be a violation of the defendant's constitutional rights to hold that this failure to speak established guilt. However, it is constitutional to prove that he refused to give the voice identification or handwriting sample.

This situation demonstrates why it is important that you do not confuse the defendant in the process of explaining his rights. If you warn the defendant about his *Miranda* rights and at the same time demand a handwriting or voice identification sample but neglect to state that he has no right to refuse this request he may infer that the *Miranda* warning relieves him of the obligation of supplying a voice identification sample. If this misunderstanding on the part of the defendant appears in the record, it would be unlawful to prove or comment on the defendant's refusal to give the voice sample.

Handle this problem in stages. If you are going to interrogate for the purposes of a confession or admission do so, but if you are going to ask for a handwriting or voice sample do so. Do not try to give the *Miranda* warning and take these samples at the same time.

QUESTION: Is bringing a suspect back to the scene of the crime, shortly after the crime was committed, for identification by witnesses legal without the need of warning the suspect as to his right of counsel?

ANSWER: It is my view that the United States Supreme Court decisions in the *Wade* and *Gilbert* cases would extend to any type of pre-trial identification. Bringing a defendant back to the scene for the purposes of being viewed by witnesses or the victim is a form of pre-trial identification.

In reading the United States Supreme Court decisions you will find that one of the things the court is troubled by are these single identification lineup cases. It was felt that only one man being viewed by the victim may suggest to the victim that this is the man. Therefore if any-

thing is clear it may be that the necessity for a lawyer at that kind of a lineup is even more urgent than it would be at a regular police station lineup. Thus, I would not be surprised to find the Court stating that the defendant's right to counsel arises at on-scene identifications, and that the police officer must warn the suspect of his right to counsel.

QUESTION: Is it necessary to find all the items specifically set forth in the search warrant before you can legally take or seize a different item you find?

ANSWER: No, it is not necessary. The fact that you do not find that for which you are looking does not mean that you are there illegally or that there was no probable cause to search in the first place. If you do not find the narcotics, for example, but gambling apparatus, it can be seized and used in a prosecution for possession of gambling apparatus.

This comes back to the general rule that a search is either good or bad at the inception and it does not depend on what you turn up.

QUESTION: This is a hypothetical question in which the defendant is going to be in a lineup. He is advised of his right to counsel, he employs counsel, or counsel is employed for him, and his lawyer advises the defendant to refuse to appear in the lineup. What should the police do in that situation?

ANSWER: There is a problem which arises in attempting to answer this question. The United States Supreme Court, in the *Wade* and *Gilbert* cases, did not tell us what the police should do if the defendant either on his own or by the erroneous advise of counsel says he will not appear in a lineup. The failure to appear might be construed and proved as an admission, except in those cases where the suspect believes, albeit erroneously, that he has a right to refuse to appear.

QUESTION: The following is an actual case. An officer was involved in the execution of a search warrant for gambling in which gambling paraphernalia was found. In the process of serving this search warrant the police confiscated a film projector, the film in the projector, and a screen, the tools of showing obscene movies. A return was made on the warrant including these items. Would any or all of these items be returned?

ANSWER: If it was unlawful for some reason to possess the film or the projector it would not have to be returned. You should not return those items procured during the search but not authorized in the search warrant, on the warrant return. You should make a separate return of these objects.

The fact that you erroneously went ahead and included these items on the return for the search warrant, however, should not affect the question of whether they are to be kept. If these are contraband articles you

should be able to keep them. If, however, they are innocent property of the defendant they must be returned.

QUESTION: When making an arrest in the defendant's apartment or house on a narcotics charge, can you search the entire area without a warrant for evidence, and if so, upon what case is this based?

ANSWER: If the arrest is for the possession of narcotics and you are looking for the supply, or for the sale of narcotics out of this home and you had probable cause to believe that the defendant had a ready supply at hand, you could search. Narcotics are the type of material which can easily be concealed, and could be found in any area of the home.

Of the cases which I have read upholding the search of the entire house, *People* v. *Alexander* went so far as to authorize the ripping up of a floor board. The *Harris* and *Rabinowitz* cases, which were decided by the United States Supreme Court, were examples in which the search of the premises lasted for a number of hours and were fairly extensive.

In those cases where it is clear that there is probable cause to believe the material is there, or in which the material was easily concealable, the courts have sustained the search even though the scope of the search reaches into areas other than that in which the arrest is made.

QUESTION: If an officer's responsibilities while on duty include making private property checks, can he request a search warrant following the observation of a crime of stolen property?

ANSWER: This is going to depend to a certain extent, on the laws of the local jurisdiction defining the right of the police officer to be on the premises in the first place. In Illinois, the statute allows officers to check licensed premises (taverns, pawn shops, etc.) on the theory that when the license was applied for, Fourth Amendment protection was impliedly waived.

Considering a statute of this sort, if a police officer was in the general public area of the licensed business premises and he saw or heard things which led his to believe that property was then on the premises for which a search warrant could be obtained, he should obtain such a warrant and return.

Two recent United States Supreme Court decisions involving administrative searches raise a difficult question in this regard. It used to be the rule that housing and plumbing inspectors, and arson investigators, could go onto the premises and make "administrative searches" checking for violations of the building or health codes without a warrant. The Court had previously ruled that these searches were an exception to the rule that warrants were required before you could enter the premises.

Recently these exceptions were overruled. Housing, health, and arson checks cannot be made now in either private premises or business premises

which are not open to the general public, without the issuance of a search warrant. Although it is true that the Supreme Court has relaxed considerably the probable cause requirement for administrative search warrants of this nature, it is still true that some kind of warrant and probable cause are necessary. Therefore, you may encounter a case where the new ruling applies. Yet if an officer, in the performance of his duty under a licensing statute, is on business premises, and particularly in that area of the premises which is also open to the general public, it is not necessary for him to have a search warrant before he goes in there.

It is also not necessary to obtain a warrant, where a man is running an operation out of his home. Suppose that an individual is selling narcotics or gambling slips out of his house, and he is willing to invite into his home any member of the general public who wants to make a purchase. A police officer who appears there, posing as a customer, without revealing his identity stands in the same position as any member of the general public. As such, the police officer has the right to enter the defendant's premises, even though it is a home, for the purposes of posing as a vice customer, and what he observes may be the basis for an arrest or subsequent issuance of a search warrant.

QUESTION: In your opinion, to what extent may an attorney participate during a lineup?

ANSWER: The United States Supreme Court has not yet defined the extent to which an attorney can participate in the lineup. The attorney ought to be allowed to circulate anywhere within the area of the lineup in order to fulfill his function of viewing the proceedings. I do not think you have to give him a canvas backed director's chair, megaphone, and cap, and then let him run the show. However, at the same time the rule to follow is not to interfere with his view or hearing of the lineup. If he is being obstreperous and telling you how to conduct the lineup and you want to ignore his suggestions, do so. If you feel you are conducting the lineup properly and the attorney is able to see and hear the proceedings your right to ignore his suggestions is backed by the Court which ruled that the attorney is there *only* to see and hear what the police are doing.

The United States Supreme Court, as a result of the *Wade* and *Gilbert* opinions, is not giving defense lawyers a carte blanche to tell police officers how to run their lineup. If the police officers are acting improperly during the lineup, the attorney can bring this out in court. At the same time, the police ought to be courteous and willing to listen to any reasonable suggestions that the defense attorney makes.

QUESTION: Would it be proper to subpeona or call the attorney to the stand in rebuttal as a prosecuting witness?

ANSWER: This question raises one of the problems in these lineup cases, and the Supreme Court did not treat it in the opinions. The Court

said a lawyer is entitled to be there as a witness so that he can be prepared to expose any defects in the lineup at the trial. However, suppose the attorney saw something he considered to be a defect and upon questioning the police officer at the trial the officer denies that anything improper occurred. At this point there is probably only one thing for an attorney to do and that is to take the stand himself and testify as to what occurred during the lineup. Yet, once the attorney has done this he has destroyed his effectiveness as the attorney in this case and he will probably have to step down. Where this leaves the trial, the court, and the defendant was not discussed by the Court in these previous cases. We may have to have two lawyers at the lineup, one to testify in court and the other to run the trial.

QUESTION: Could we take the reverse of your lecture example where the rape victim is viewed at the corner of an alley and a scout car runs around and picks up the suspect and delivers him to the victim. Consider the case where the victim is put in the scout car and driven around the neighborhood, and she picks out the accused. What is your opinion of such action?

ANSWER: The case where the victim spontaneously picks the defendant off the street corner without any suggestion or prompting from the police is probably an easier one. The United States Supreme Court, in this kind of case, would probably rule that it was not an identification with any potentiality for unfairness and therefore would not be a critical stage, and so the presence of a lawyer would not be required.

You are always going to be safer in these cases when the victim picks out the defendant without any promptings by the police, or without the police bringing an individual to the victim. I would think in this hypothetical question that the rule would not apply.

QUESTION: Could a person under arrest who refuses to give a handwriting sample, a voice identification sample, or to appear in a lineup, be charged with resisting and obstructing the officer's lawful performance of his duty?

ANSWER: No!

QUESTION: Could you help to establish probable cause by using the crime statistics for the area in which the arrest is made?

ANSWER: Yes, and you will find more and more cases of probable cause turning on the fact that the arrest was made in an area with a high crime rate. This is particularly important in those cases in which the probable cause arises out of initial street-stop or street-interrogation on less than probable cause and probable cause develops during the street-interrogation.

The courts are always quick to take note that an area has a reputation, for example, of being one where there is a narcotic trade being

conducted. As an illustration of this case a patrol car comes down an alley in the middle of the night and a car is seen parked there illegally with the motor running and lights on and someone is fooling around with a door at the end of the alley. If the officer is able to testify that the alley has a recent history of break-ins, this is an important factor in determining probable cause.

All of the things which would make an officer suspicious should be fully translated into his testimony at the trial. In another case, if a stop is made at night, the officer is alone, there are three people in the car, and in order to protect himself he conducts a weapon search, he ought to report these details to the court. If the question is one concerning the search for evidence of an offense he ought to say that the area has a recent history of break-ins or that it is known to be one in which narcotic transactions take place, if that is the case. These facts are always very important in determining probable cause.

QUESTION: In the execution of a search warrant what amount of force or action can be taken against a refusal to allow a lawful search?

ANSWER: The same amount of force can be used as in an effort to effect an arrest. In other words, a prospective defendant or person arrested should not be allowed to defeat either an arrest or a search by resistance. Police officers can use whatever reasonable force is necessary to effectuate either the arrest or the search. Under this same principle, if a person refuses to open the door after you have given him notice of your purpose and authority, in addition to proceeding under a valid search warrant, you can kick the door down. If the individual interferes with the officer, while the officer is on the premises, the police officer may use whatever force is necessary to subdue him.

SEARCH OF VEHICLES; THE INFORMER PRIVILEGE; FUTURE TRENDS IN THE LAW

by James R. Thompson*

The lecture this morning is concerned with the informer privilege, when the identity of an informer must be disclosed, and the rather complex subject of when proper searches of vehicles may be made after an arrest of the driver or the passengers. In addition we will touch upon the related subject of when second or subsequent searches of the person of a defendant may be made away from the scene of arrest.

We should begin, I think, by discussing the informer privilege, since a recent decision by the United State Supreme Court has fairly well settled the law in this area. And, since the Court's decision interpreted the Fourth Amendment this opinion is not only binding upon, but in other aspects may be readily followed by, most of the state supreme courts including the Supreme Court of Michigan and the Michigan Appellate Courts.

We ought to begin with a decision of the United States Supreme Court which is several years old and which before it was reinterpreted in the *McCray*[1] case produced some confusion for law enforcement officers. This was an opinion entitled *Roviaro* v. *United States.*[2]

In the *Roviaro* case, a police informant made a purchase of narcotics from a defendant while seated in the front seat of an automobile. Unknown to the defendant a police agent was concealed in the trunk of the automobile and he was able to overhear the conversation which accompanied the sale from the defendant to the informer. At the trial only the police officer testified; the informer did not. The defendant demanded to know the name and identity of the informant to whom he sold the narcotics claiming that it was vital to his defense on the question of whether he was innocent or guilty. He claimed, for example, that the testimony of the informer might be useful to him to prove entrapment, or to prove that he was not aware of the nature of the drug. The trial judge

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[1] McCray v. Illinois, 386 U.S. 300 (1967).
[2] 353 U.S. 53 (1957).

refused to disclose the identity of the informer. The defendant was convicted and the case went to the United States Supreme Court. The Court reversed the trial court decision, holding that when the issue was one of guilt or innocence, and the identity of the informant was relevant in establishing the case of the defendant on that issue, the identity of the informant had to be disclosed.

After that decision most of us understood that case to bind both the federal government and the various state law enforcement agencies. We took that to be a rule of due process. We thought that the rule that was applicable in all jurisdictions, including that of the states, was one which simply said that where the question is one of guilt or innocence and the informer's identity would be helpful to the defendant to prove his defense to the charge, the informant's identity had to be disclosed. The state supreme courts followed that decision of the Supreme Court.

The *Roviaro* decision, however, left open the question of whether or not the name of the informant had to be disclosed when the issue was one other than innocence or guilt. The most important alternative issue in these kinds of cases is whether or not there was probable cause for the arrest or probable cause for the issuance of a search warrant.

Suppose that a police officer comes before a judge and requests the issuance of a search warrant, and his probable cause for the issuance of that search warrant is that he was told by an unnamed informant that the defendant was in possession of whatever goods he wanted to seize. Assuming that the informer's reliability was established in the manner that we discussed last week; would the police officer have to disclose to the judge the name of the informant at the time he obtained the search warrant? Assume that the search warrant was issued and executed and the case came to trial. If there was a motion to suppress and a hearing on that motion would the police officer have to disclose the name of the informant to the defendant on demand? Suppose that instead of seeking a search warrant a police officer simply made an arrest without a warrant based upon the word of an informer and there was a motion to suppress at the trial. Would the identity of the informant have to be disclosed?

Most courts which ruled on this issue said "no." They held that the only time the identity of the informant had to be disclosed was when the informant's testimony would be relevant to the issue of innocence or guilt. They refused to extend the *Roviaro* rule to cover those situations in which the informant's communication to the police officer merely constituted probable cause for arrest or for a warrant.

Some states made a distinction between the search warrant cases and those of arrest without warrant. California, for example, said that if it was a question of arresting without a warrant the informer's identity had to be disclosed. However, if a judge passed upon an application for a search

warrant he need not require the identity of the informant. Most of the states drew no distinctions between warrants and arrests without a warrant. They said that if a police officer's testimony, either in an arrest case or in a warrant case, established probable cause, the defendant was not entitled to the name of the informer.

Well, what is the purpose of this rule? As far as law enforcement is concerned, the rule serves to protect the identity of the informer: to protect informers from coming to physical harm at the hands of defendants whose convictions have been made on their testimony and secondly, to keep the informer "active." The theory is that if an informer knows that he is going to be named in the first case on which he works, he is not going to continue as an informer thereafter.

This question of whether or not an informant's name had to be disclosed produced a very bitter dispute in several state supreme courts, including the Supreme Court of Illinois. In a case which I had in that court, *People* v. *Durr*,[3] the Supreme Court of Illinois first held four to three that an informer's name had to disclosed. In the same term that the *Durr* opinion came down, the court also had before it a murder case in which the victim of the murder was a narcotics informant and the defendant in the murder case was the narcotics peddler the deceased had informed against. We filed a petition for rehearing in the *Durr* case, pointing out that this murder case on their docket at the same time demonstrated why the informer's privilege was so vital to law enforcement. We contended that if they continued to adhere to this four to three ruling requiring the disclosure of the identity of the informant, more murders would follow and the responsibility for those murders would rest, in part, upon the shoulders of the court which required the disclosure of identity. That was putting it rather strongly we thought, but it had to be stated strongly in order to save the informer privilege in Illinois. And evidently the strength of the petition for rehearing and the sentiments it contained persuaded at least one justice of the court, for they granted the petition for rehearing in *Durr*, and the next term the court came down with an opinion which held four to three that the identity of the informer need not be disclosed.

That rule has now been adopted by the United States Supreme Court. Therefore, any jurisdiction is free to hold, and all of them I assume will, that where the issue is probable cause for arrest or for the issuance of a search warrant the identity of an informer need not be disclosed. This, however, leaves open to the judge a discretion to require the disclosure of identity whenever he feels it would be necessary to establish probable cause in his own mind. In other words, the Court has not said that state trial judges must refuse disclosure; it has merely said that trial judges may refuse disclosure, at their discretion. But, as a practical matter, given that

[3] 28 Ill. 2d 308, 192 N.E. 2d 379 (1963).

option, most state trial judges and most state supreme courts will very rarely require a disclosure in probable cause cases.

This is not to say that a defendant has no right of cross-examination concerning matters other than identity. Because when a police officer gets on the stand and says that the probable cause for the arrest was based upon what an informer told him, the defendant has the right to cross-examine the police officer in order to test the officer's conclusion that the informant was reliable.

If it is a relevant issue as to what the informer has done in the past, the defendant certainly may cross-examine the police officer in this area. The question yet to be decided is how far the defense attorney may go in cross-examining the police officer as to what the informer has done in the past without getting into the area of his identity.

Is it proper, for example, to ask about past convictions? Well, I suppose it is. But, I suppose also that you could take your cross-examination by the defense attorney to the point where he has been given so much about the past reliability of the informant that he in effect will find out his identity. So trial judges, in individual cases, are going to have to draw the line somewhere in the defense's cross-examination of the police officer as to past reliability so that identity will not be disclosed. It is clear that if the defense attorney asks the question directly about the identity of the informant his name need not be disclosed.

There is one more case in this area which the United States Supreme Court will hear this fall. It is not directly involved with probable cause, but because it is a Supreme Court case we ought to mention it. In this case, which was a conviction in Illinois for the sale of narcotics, the informant actually got on the stand at the trial and testified that the defendant had sold narcotics to him. On cross-examination the defense attorney said to the informant, "Is John Jones your real name?" And, the informer said, "No it isn't, it's an alias." The defense attorney said, "What is your real name?" The prosecutor said, "I object" and the judge said, "sustained." The defense attorney said, "Judge, I want to know the real name of this informant so that I can develop my cross-examination, so that I can go out into the community and inquire about him to find matters which may affect his credibility as a witness in this court." But the court, applying the informer privilege, refused to allow the defense attorney to find out the true name of the informer who sat on the stand. The defendant was convicted and the Court has agreed to hear this case this fall. I do not think there is much question about the outcome of the appeal in the Court. I am sure they will say that once an informer takes the stand in a trial, and testifies that he purchased narcotics from a defendant, the defendant is entitled to know his true name so that he can determine his reliability as a witness.

This case will fall under the *Roviaro* doctrine of the participant-informer, where identity should be disclosed, rather than under the *McCray* doctrine of the informer who furnishes probable cause for arrest or search.[4]

To summarize the law in this area, we can say that the Supreme Court requires the disclosure of identity of an informant when the informant is a participant in a crime or whenever his testimony may be helpful or relevant on the issue of innocence or guilt, or on possible defenses. The Court will not require disclosure of the informant when the informant's communication merely constitutes probable cause for arrest or probable cause for the issuance of a search warrant. The Court will probably require disclosure of the informant's true identity when he takes the stand and testifies. It is a rare case, I think, where an informant gets on the stand and refuses to disclose his true name. What his reasons for refusing to do so in this trial in Illinois were, I do not know, and what the reasons for the prosecutor objecting to the disclosure of his name were, I do not know.

The topic of search of vehicles is an important one these days because of several decisions of the United States Supreme Court, many state supreme court decisions, and a case now pending in the Court which may very vitally affect the power of the police to search vehicles which they have lawfully impounded and taken into their custody.

Let us go first to the area of search of vehicles incident to a traffic arrest, because this is the area which is producing a lot of the recent cases. The rules which have developed in the state courts, including both Michigan and Illinois, are pretty similar and they have changed over the years. The doctrine of search incident to traffic arrest began in this fashion and, I think, it can best be described by outlining a couple of Illinois cases that I had in the Supreme Court of Illinois when I was in the State Attorney's Office.

When the police officer makes a valid arrest on probable cause he has the right to make a search incident to that arrest for weapons, for implements of escape, or for evidence of the offense for which he makes an arrest. This rule of search incident to an arrest is a very old and familiar rule. Acting on this rule, the police officers in various localities throughout the United States, and especially in the city of Chicago, began to use it in traffic cases. Especially in traffic cases which they made as the result of vice investigations.

What the police officers would do is to have members of the vice detail cruising the streets, either the narcotics people or more especially the gambling people, and they would follow known policy-runners. They would wait until the policy-runner who was driving his automobile com-

[4] In Smith v. Illinois, 390 U.S. 129 (1968) the United States Supreme Court so held.

mitted a traffic infraction, and he always did because you can not drive in a large metropolitan city without committing a traffic infraction. They would pull the defendant's car over to the curb and they would arrest him for the improper turn, going too fast, wandering over the yellow line, or in some cases even for parking violations. They would get out and measure the distance from the curb to the wheels and if it was an inch over he would get a traffic ticket. Sometimes the tail light or light over the license plate would be out. It was frequently alleged that police officers, after stopping the car, would walk around by the license plate and unscrew the bulb or knock it out in some fashion, but defendants were rarely able to prove that.

In any event, the technique was for the vice men to follow a suspected policy-runner or narcotics seller in his car until he committed a traffic infraction, arrest him for the traffic infraction (it was a good arrest) and search both his person and his automobile pursuant to the arrest. The courts would uphold it, saying that the defendant had committed a crime in the presence of the police officer, the arrest was valid and everybody knows that once you make a valid arrest you can make a search incident to an arrest. So the heroin or policy slips that were turned up during the course of this search were admitted into evidence and the defendant was convicted.

Then, several years ago, two cases went to the Supreme Court of Illinois, *People* v. *Mayo*[5] and *People* v. *Watkins*.[6] In the *Watkins* case the police officers testified that they were members of the gambling detail, that they saw the defendant's car and saw the defendant come out of a building. They knew him to be a gambler with previous convictions for gambling. They were standing at his car. When he saw them he ducked back into the building where he remained for 20 minutes and finally came out to his car. They placed him under arrest for a parking violation, too far from the curb, and searched him as he sat in the front seat of his car and found policy slips in the glove compartment.

In the *Mayo* case the police officers were following the defendant. They saw him park too far from the curb. They arrested him. The police officer testified that he searched the car and in the glove compartment of the car he found contraband. On cross-examination the police officer was asked why he searched the glove compartment of the car, and he said he was looking for anything that might turn up — guns, knife, policy, anything at all.

The Supreme Court of Illinois said that the search in the *Watkins* case was good and the search in the *Mayo* case was bad, on this reasoning: while it is true that a valid arrest will normally justify a search incident to arrest, that search cannot be made unless the purposes of the rule

[5] 19 Ill. 2d 136, 166 N.E. 2d 440 (1960).
[6] 19 Ill. 2d 11, 166 N.E. 2d 433 (1960).

of search incident to an arrest are present. That is, for weapons or for implements of escape or for evidence of the crime for which the arrest was made. They upheld the search in the *Watkins* case on the basis of a weapon search. They said the defendant was known to the police officers, and his suspicious actions in ducking inside the door when he saw the police officers justified the officers' belief that they were dealing with somebody other than an ordinary traffic violator. Therefore, for their own safety while they were making out the traffic citation they had the right to search for weapons, and if they turned up contraband during that search it was admissible. The principle is sound. The principle is that if you have a traffic violation plus suspicious circumstances, you can make a weapon search. They probably stretched the facts of the particular case a little thin, using the action of ducking in and out of the door as the justification for the weapon search, but that is all right.

On the other hand, they said that in the *Mayo* case it was clear that the police officer had no fear for his own safety; he did not testify to any facts which would indicate the criminal record of the defendant or that he needed to take special precautions or that this was other than a routine traffic case. In addition it was clear from his testimony that he was conducting an exploratory search to turn up whatever he might find.

The rule in Illinois and in Michigan has now been a little further refined and it can be stated generally as follows: If you have simply a routine traffic arrest in which the record does not demonstrate that the officer ought to have any concern for his own safety during the course of the arresting process, and if there is no evidence of the traffic arrest which could be found in a search, a search either of the driver's person or of the vehicle can not be made. If you have what is an otherwise routine traffic arrest, but you have circumstances which make it reasonable for the officer to search to protect himself during the course of writing the ticket, a search of the person, and of parts of the vehicle, can be made. If you have a traffic arrest for which you are going to take the defendant into custody — for example, take him to the police station rather than issue a summons allowing him to drive his own vehicle away — a search can be made on the basis of the weapons rule. And, if you make a traffic arrest for which evidence of the offense may be turned up, a search may be made.

Let us give a few examples of those various situations. Suppose you have a traffic arrest by one police officer, in the dead of night, in a deserted area with three or four juveniles in the car. The officer is by himself. The area has a reputation as a bad crime neighborhood. The police officer would be perfectly justified in searching the driver of the car, the passengers, and the interior of the vehicle, at those points accessible to the driver and the passengers, to protect himself from weapons while he was making out the traffic ticket. And, if he found not weapons, but contraband, that contraband would be admissible.

On the other hand, if the police officer stops a little old lady at the corner of First and Main, in the heart of town, on Saturday noon, because she made an improper right hand turn and that is all the record disclosed, he would not be justified in searching that little old lady or the interior of her car for anything.

If, for example, a police officer had made an arrest and he found that the driver had no license, and therefore could not post a license as bail, and it was necessary to take the driver into custody and to the station, a search for weapons could be made. If the police officer is making an arrest for drunk driving, a search of the vehicle's interior would be proper for evidence of the offense as well as for weapons because a drunk driver is going to be taken into custody.

The important point to remember in all of these cases is to put on the record, at the hearing on the motion to suppress, those reasons why the officer made the search of the vehicle, because we all know that searches of vehicles in routine traffic cases are just not made. A police officer could not keep up with the rest of his duties, if he was a traffic officer, and spent his time searching the person of the driver, passengers, and the interior of the vehicle in every traffic arrest he made. We know that police officers make searches of vehicles in traffic arrests only when they have reason to suspect that something else is going on. And, nine times out of ten, or nine and a half times out of ten, if the facts which impelled the officer to make the search in the first place are brought to the attention of the trial judge and are placed on the record they will be sufficient to justify the search. But it is most important to get the facts on the record: there were other people in the vehicle, the officer was alone, he was in a deserted or high crime neighborhood, the traffic offense itself was a suspicious offense (a bent license plate which might lead an officer to believe that the occupants of the car were attempting to hide their identity for example). If all of these things are put on the record, ordinarily they will justify at least a weapon search in almost every case.

Michigan had a case in 1964 which illustrates this principle somewhat, although it is not strictly a traffic arrest and incidental search case. This is the case of *In Re Winkle*.[7] In the *Winkle* case an automobile was proceeding on a state highway late at night and it made a left turn without waiting for a traffic light to turn green, proceeded up the road and then turned into the driveway of a motel. Two Michigan State Police officers followed the automobile, put on their siren, stopped the automobile in the driveway of the motel, and got out and talked to the driver and his passenger. One officer talked to one passenger; one officer talked to the driver. Then they switched. Unfortunately for the driver and the passenger, conflicting stories were told about who they were, where they were going and where they had been. The police officers also saw an open bottle

[7] 372 Mich. 292, 125 N.W. 2d 875 (1964).

of vodka on the front seat, the car was not registered in the name of either of the occupants, and the men were from Indiana but the driver had a Florida driver's license. They searched the trunk and found a pretty good collection of burglar's tools. The Supreme Court of Michigan held that the search was valid and the facts were so suspicious that the failure to conduct a search of that car would have justified the discipline of the officers.

Now, this is not strictly a search incident to traffic arrest case. Why? Well, it cannot be sustained on the basis of a weapons or implements to escape test because the search was of a locked trunk. The weapons or instruments of escape were simply not accessible to the defendants. It cannot be based upon an evidentiary search because there is no evidence of an improper turn through a red light to be found in the trunk of an automobile. So it has to be sustained on some other basis. And, as I understand the opinion of the court, they held that having made a valid arrest for a traffic offense and having the defendant and his car in their custody, the suspicious circumstances surrounding the traffic offense gave the police officers probable cause to believe that the defendants had committed or were committing another crime. Therefore, there was probable cause to arrest them for a crime and to make an evidentiary search of the car pursuant to that arrest, not pursuant to the traffic arrest.

Of course, one problem with the opinion is that it is not precisely clear what that crime was. When I first read the opinion, I thought they were talking about probable cause to make an arrest for burglary. It turns out that at least one or two justices of the Supreme Court of Michigan thought that there was probable cause to make an arrest for possession of a stolen car. In any event, there seems to be no requirement that police officers have in mind a particular crime so long as there is probable cause for believing that a crime had been committed. So that the *Winkle* case illustrates the proposition that police officers having made a valid traffic arrest and having found suspicious circumstances pointing to probable cause for believing that another crime had been committed may go further in search incidental to arrest than they can if they were searching merely incident to a traffic arrest.[8]

Suppose that for one of these reasons I have outlined, the search of the vehicle is authorized. How far can you go? Well, if it is a weapons search, and you are sustaining it on that basis, a search of the person of the defendant and of the area of the car under his immediate control would be authorized. I would suppose that if the glove compartment was unlocked you could search the glove compartment, but that if it was locked you could not, on the theory that the locked glove compartment prevents accessibility to weapons in the ordinary circumstance. If you are

[8] The conviction of Winkle has just been upset by a United State District Court in Winkle v. Kropp, 279 F. Supp. 532 (E.D. Mich., S.D. 1968).

seeking to sustain the search of the vehicle on the weapons theory you could not search the locked trunk of an automobile, but if you were searching the vehicle on an evidence theory you could, as the *Winkle* case demonstrates. If you desire to make a search of the defendant and the interior of his car, you had better do it while he is still inside, because once you take the defendant out of his car and put him in you custody, or put him in the squad car, the interior of his car is no longer accessible to him and it would be unreasonable to search the interior of his car to find weapons or means of escape if he is not going back into it.

Arizona had a similar case recently and the Supreme Court of Arizona said that after the defendant had been arrested for a traffic offense, taken out, hand-cuffed because he resisted, and put into the squad car, the officers could not go back and search the defendant's car on a weapons theory because the defendant simply was not able, under those circumstances, to get any weapons out of his car. So, to repeat, if you want to sustain your weapons search, you better do it while the defendant is still inside of his car. Then you have the support of the cases which say that a search of the defendant's person and the area immediately surrounding him, that is the interior of his car, is a proper one.

Let me give you some recent examples, from the Supreme Court of Illinois, that I am sure would reflect the Michigan law as well. In several cases the searches were sustained, and in one case the search was not sustained.

In the Supreme Court of Illinois case of 1967, which was not sustained, *People* v. *Reed*,[9] the defendant was stopped by two police officers at noon. The reason for the stop was that the rear license plate was missing. He was asked for his operator's license and he produced it. He was asked for his registration and he produced it. The registration showed that he had purchased two plates for his automobile. The defendant Reed was standing outside of the car while the officers were talking to him. The officers testified that he was nervous, that he kept moving his hands, he looked from side to side and he kept looking over at his car. Seeing this strange behavior, the officers asked him if he had any weapons on him, and he said no, but they searched him anyway and found none. At this point the officers said they decided to take him down to the station to check him out.

Well, I suppose this testimony did not sit too well with the Supreme Court of Illinois because there is no such offense as "suspicion of nervous behavior" and you cannot take people down to the station to "check them out" unless you have probable cause to make an arrest. Before doing this they searched his car and under the springs of the front seat they found heroin. In reversing the defendant's conviction, and holding that the

[9] 37 Ill. 2d 91, 227 N.E. 2d 69 (1967).

search was bad, the Supreme Court said that the only reason that the defendant was stopped in the first place was because his rear license plate was missing. And, it is further undisputed that although the defendant may have behaved in a nervous manner, at no time did he threaten the arresting officers, use abusive language, talk in a loud voice or attempt to escape. The occurrence took place in broad daylight on a Chicago street. The defendant had valid identification for both himself and his automobile. And, the arresting officers admitted that the only reason they searched the defendant and his automobile was because of his nervous behavior. So, as far as the Supreme Court of Illinois is concerned, nervousness does not justify a search incident to traffic arrest but their language, I think, indicates pretty clearly that if the defendant had behaved in a boisterous or an abusive manner or given the police officers any reason at all to fear for their safety or to fear for their custody of him, then a weapon search would have been authorized. So it is important that if the defendant behaves in that manner that the officer relate that on the stand.

Two other cases from Illinois illustrate the applicability of the *Winkle* approach of the Supreme Court of Michigan, where the police officers made an original stop for a traffic offense and then turned up evidence that something more serious was going on. In *People* v. *Brown*,[10] a single police officer stopped the defendant and his companion at 1:30 in the morning because the defendant had no plates at all on his vehicle. He had no city sticker and no driver's license. He said he was coming from a used car lot where he had just bought the car, at 1:30 in the morning. He had a title but it was blank. There was a man sleeping in the rear seat with clothing and golf clubs piled up. The police officer talked to the man in the rear seat and he said that the clothing and the golf clubs were his and that they had just been to his apartment on the way from the automobile dealer. One man said that they were going to Rush Street for a little entertainment in Chicago, and the other man said they were going to the passenger's new apartment. So conflicting stories were given as in the *Winkle* case. Well, all of this put together was too much for the police officer. He searched the trunk and found stolen property and they later determined that the golf clubs and the clothing in the back seat were also stolen property. The court held that the search of the trunk was valid because the circumstances surrounding the traffic stop made it reasonable to believe that the police were dealing with more than a mere traffic violator and that it would have been difficult, if not impossible, to get a search warrant at 1:30 in the morning. Well, it was not just the lateness of the hour that would have made it difficult or impossible to get the search warrant, because if the police had gone to a judge for a search warrant they could not have put anything in the application for the search warrant to show probable cause, because they really did not know what they were looking for.

[10] 76 Ill. App. 2d 145, 221 N.E. 2d 772 (1966).

Why did the Appellate Court of Illinois sustain this search? They did not really say, other than to say it was reasonable, but I suppose what they meant to say was, given all these circumstances, the police had probable cause to believe that either the car was stolen or that the defendants had been involved in a burglary. So that a search incident to an arrest for those offenses was proper even though the police officer made no actual declaration that, "in addition to arresting you for no license and no plates, I am arresting you for burglary or suspician of burglary" or whatever.

In the second case from Illinois, *People* v. *Moore*,[11] two police officers on patrol noticed a car parked in a desolate area next to a railroad embankment without a rear license plate. The defendant was lying down in the front seat. They asked him to get out of the car and identify himself. He took out a wallet, said it was not his, and the officer looked at the wallet and saw that somebody else's name was on it. Then he took out a second wallet which turned out to be his and that contained a traffic ticket in his name. They asked who the first wallet belonged to and he said that it was his cousin's. They asked, "What is in that wallet?" and he took out three checks all made out to different people, payroll checks. They said, "That's all, you're under arrest." The appellate court sustained this search because they said that the possession of a car without plates justifies the police inquiry into ownership of the car and the identity of the possessor. And, that the missing plates plus the showing of the two wallets justified a search, that is of the wallet which produced the payroll checks, in order to ascertain the identity of the defendant. So, this is kind of a half-way case. There were enough circumstances here to indicate to a reasonable police officer that the car might have been stolen. When you are faced with circumstances indicating a stolen car, the first thing you want to know is who is this man in front of me, especially when there is some mix-up about his identity. The court held that it was reasonable for the officers to go into one of the wallets to find out his identity.

Now, since this area of search incident to traffic arrest is a little difficult, there may be a way out in a great many cases. And, that is the area of an "inventory" of the vehicle in police custody. Actually it amounts to the same thing, and in fact in some cases an inventory of a vehicle may be more thorough than an ordinary search incident to an arrest. But there are indications from the Supreme Court that they will justify or accept a police inventory of an impounded automobile in circumstances in which they would not accept a search incident to an arrest. And, that is primarily in those cases in which the defendant has been arrested, he has been taken to the police station, his car has been taken to the police station and is later searched. If you are attempting to justify that search as a search incident to an arrest it is no good. Why? Because the defendant

[11] 76 Ill. App. 2d 326, 222 N.E. 2d 95 (1966).

is not there and the search is taking place at a time other than at the place and time of the scene of arrest. So it simply is not incident to an arrest, but it may be sustainable on another basis.

In this regard, two cases from the United States Supreme Court plus a case that they are going to decide next term are important. The first is *Preston* v. *United States.*[12] In the *Preston* case, local police officers in Newport, Kentucky, received a telephone tip that there were three men sitting in a car in front of a bank acting suspiciously. They had been sitting there from 10:00 p.m. until 3:00 a.m. The police officers went out to investigate. They asked the three people in the car for identification. They asked them what they were doing there. They said they were waiting for a friend who was a truck driver who was coming through town, but they did not know when he was coming through town, who he worked for or what his truck looked like. They had 25¢ between them. They were arrested for vagrancy and taken to the police station. Their car was later taken to the police station and searched, about an hour and a half after the arrest, and in the trunk of the car was found a complete bank robbing kit including masks, tools, etc. They were turned over to the FBI, indicted, and convicted of conspiracy to rob a federally insured bank.

The United States Supreme Court held that that search of the automobile trunk at the station an hour and a half after the arrest was improper and that the evidence ought to have been suppressed. Why? Because the government sought to sustain that search as a search incident to arrest for the crime of vagrancy. And, the arrest for the crime of vagrancy not only took place an hour and a half before the search was made, at a place other than that at which the search was made, but in addition the court said there is a difficulty that ordinarily there are no evidences of a crime of vagrancy which could be found in an automobile trunk. So that on both a weapons basis or an evidentiary basis the search was not proper as a search incident to an arrest and it was compounded by the fact that it took place at a time and place different than the time and place of the arrest itself.

After *Preston,* most people thought that that case stood for the proposition that a delayed search of an automobile is always bad. But, just last year the United States Supreme Court decided the case of *Cooper* v. *California.*[13] Mr. Justice Black writing the opinion, the same Justice who wrote the *Preston* case, held that a search of an automobile one week after the arrest was good. How did they distinguish *Cooper* from *Preston?*

In the *Cooper* case the defendant was arrested for the sale of narcotics. His car was seized because California, like many states, has a statute which says that all automobiles used in the commission of narcotics

[12] 376 U.S. 364 (1964).
[13] 386 U.S. 58 (1967).

crimes are forfeited to the state. So they took the defendant Cooper's car and they put it in the police garage and held it for the forfeiture proceedings which were to follow. A week later they were inventorying the contents of the car and they found a piece of brown paper in the glove compartment which matched the brown paper bag in which the narcotics had been sold, so they used this piece of paper from the glove compartment at the criminal trial for the sale of narcotics. And the Supreme Court of the United States held that this was not a search which was sought to be sustained on a search incident to arrest basis, and indeed it could not be because it took place a week after the arrest, but they said that since the custody of the car was lawful, since the police had the right to impound and hold the car for evidence and for later forfeiture, the police had the right to protect themselves from charges of missing property by inventorying the contents of the car. And, that whatever was found in that car inventory could be admitted in evidence at a trial on criminal prosecution.

Ever since the *Preston* case came out several years ago, I have been telling police departments throughout the Country that they can save themselves a lot of time and trouble if they would adopt uniform rules or police department regulations, preferably in writing, governing the inventorying of vehicles which come into their possession. For example, they ought to have a rule in the police department which says that whenever a defendant is arrested in possession of an automobile and the circumstances are such that they cannot leave the automobile on the street when the defendant has to be taken to the police station, that the police are to impound the vehicle, bring it to the station, inventory its contents and give the defendant a receipt. This procedure ought to be a uniform one in every case. One officer who is designated as a vehicle control or vehicle inventory officer should be designated to search all of the vehicles and to make up the receipt and give it to the defendant. The searches of cars on that basis have a better chance of being sustained than those cases in which a man is arrested for suspicion of burglary and his car is brought into the police station and two or three hours later the investigating officer gets the idea to search his car, and he goes out and searches it without a warrant looking for burglary tools or stolen property; and then he comes into court and says that he did it because he was inventorying the contents of the vehicle for the protection of the defendant. Since this police officer is not an inventory officer, there is no uniform police department regulation, and when there is no uniform practice it is pretty clear that he is searching the car just to see what he can find.

The *Cooper* case, I think, now justifies some of what I have been saying to police officers around the country: a regulation which establishes a uniform procedure for the inventorying of vehicles in lawful police custody will produce the same or better results, as far as the police are concerned, and with more legitimacy as far as the United States Supreme

Court is concerned. Within the next year we can probably tell whether or not I am right in this regard because the Court has agreed to hear a case from the District of Columbia which involves a departmental regulation of the District of Columbia Police Department governing the inventory of police controlled vehicles. And, this is the case of *Harris* v. *United States.*[14]

In the *Harris* case, which involved a robbery, the defendant's car was seen leaving the scene of the robbery. It was found several hours later and the defendant was arrested as he was getting into it in front of his home. He was taken to the police station. The officer who made the arrest called for the police towing crane and the car was taken to the station. The arrest was made at 1:30 in the afternoon. At three o'clock in the afternoon the towing driver came into the station and told the arresting officer that he had just brought the car on to the lot. He said that although it was raining and the windows of the car were down he had not rolled them up because he did not want to disturb any fingerprints. The arresting officer testified that he immediately went out to the car in the parking lot for two purposes. One was to inventory the contents of the car, as required by the police department regulation, and the other was to roll up the windows because it was raining. He went out and he began his inventory by opening the car on the driver's side, making a thorough search of the interior of the car, and putting a tag on the steering wheel, making a list of the things that he found, and delivering it to the police property clerk. Having completed this inventory he went around to the other side of the car, the passenger side, as he testified, for the sole purpose of rolling up the windows. He opened the back door and rolled up the back window. He opened the front door to roll up the front window and on the door jam, concealed when the door was closed but in view when the door was open, was found a card which had been lost from the wallet of the robbery victim. So that by inventorying the car and by rolling up the windows to protect the car interior from the rain he found evidence of the crime of robbery. The District of Columbia Court of Appeals refused in this case to pass on the validity of the District of Columbia Police regulation generally, but simply held that there was no search because the police officer's purpose in opening the door was to roll up the windows to protect the defendant's car and once he opened the door the card was in open view. So that in contemplation of the Fourth Amendment there was no actual search.

Well, if the case was this simple I think the Supreme Court would not have agreed to hear it. They will probably hold that the opening of the car door was the equivalent of a search and then they will have to go on and examine whether or not the car was lawfully in the custody of the police and whether or not the regulation of the District of Columbia Police Department providing for inventorying is a valid regulation. So we

[14] 390 U.S. 234 (1968).

will know within the coming year whether or not police departments ought to adopt uniform rules dealing with the custody of vehicles which come into their possession. But, I think that police departments that are alert to this problem ought to go ahead and adopt such regulations now in the hope that the Court will sustain them and be that much ahead of the game.[15]

There are circumstances where a search of a car may be valid even though there is no impounding and there is no arrest. This is a recent decision of the Supreme Court of Illinois. A police officer said he was driving down the street and he saw a car further on down the street, with the defendant standing in front of it. All of a sudden, for no reason, the defendant started shooting at the officer. The officer got out of his car and gave chase. The defendant fled and he wasn't able to catch up with him. However, another police car came and the officers returned to the defendant's car which was parked at the curb. They had the evidence technicians come out. They saw a cloth bag on the rear seat of the car. They entered into the car, opened the bag, and found a sawed-off shot gun. The defendant was later captured and prosecuted for the possession of the shot gun. He made a motion to suppress the evidence. He said, "I wasn't arrested at the car. The gun was discovered before my arrest was made." He came back 4½ hours later. They staked out the car after they found the weapon and he came tracing back 4½ hours later whereupon the police arrested him. He said, well the search was made 4½ hours before the arrest so it is clearly not a search incident to an arrest. And, since the police did not have his consent and they did not have a search warrant the search could not be any good.

The Supreme Court of Illinois disagreed. The court said there was no time to get a search warrant. I don't know why they keep saying in these circumstances there was no time to get a search warrant. What they should be saying is you could not get a search warrant. How do you get a search warrant for a cloth bag inside an automobile when you do not know what is inside the bag? They said the police officers as they stood surrounding this car, the defendant having just fled after shooting at a police officer, did not know if and when the defendant would return and did not know that if he returned there were no weapons in the car which he might use to make good his escape. Furthermore, they said the police were under duty to determine the cause of the shooting. In addition, they had probable cause to believe that something was in the car which might lead to the motive for the shooting so that it was reasonable for the police to go into the car and search it. In fact, in using language which the Supreme Court of Michigan used in the *Winkle* case they said that their failure to act properly might have subjected them to discipline. And,

[15] The United States Supreme Court agreed with the Court of Appeals that no search took place. See Harris v. United States, 390 U.S. 234 (1968).

when a police officer could reasonably be subjected to discipline for failing to act, his actions in regard to the Fourth Amendment are usually reasonable. So here you have an area entirely separate and apart from a search incident to an arrest or inventory of an impounded vehicle — just a plain search of a car which is reasonable because of the peculiar facts of the case. In this case the search was justified since the car might lead to some evidence of why this defendant was shooting at a police officer.

Can you search a defendant a second time after you have searched him at the scene of the arrest? Suppose you arrested the defendant for whatever offense; at the scene of the arrest you make a search and find nothing. You take him to the police station. There a second search is conducted, either by the arresting officer or perhaps by the lockup keeper. It may be a frisk; it may be a complete inventory of the defendant's possessions as it usually is prior to allowing a man to enter a cell block. You want to make sure he is carrying no contraband or weapons or things of that sort. It may even be as thorough as a strip search in some jails.

Is that proper? Is it really a search incident to an arrest? Some defense lawyers have argued "no." Why? Because a search incident to an arrest was made at the scene and the theory is that once you have made a search incident to an arrest at the scene you have exhausted your power as to a search incident to an arrest and cannot make a second one. This constitutes an administrative search in much the same manner as a vehicle inventory. Since it would be unreasonable to put a prisoner in a cell block without determining whether or not he was in possession of contraband or weapons, it is reasonable to search him to make sure that he is free from contraband or weapons. Remember though to inventory his personal possessions, and to give him a receipt so that he cannot later claim the police stole something from him while he was in police custody. Searches at the police station after a defendant has once been searched at the scene of the crime are supportable on the administrative search theory. Two recent cases illustrate this principle.

In a case from the Supreme Court of Missouri the defendant's car was found in a ditch after he had collided with a bridge. He was drunk. He was arrested for being under the influence, and he was frisked on the scene for what the police officers described as large weapons. None were found. He was taken to a district station and then into police headquarters. He was booked. He was told to empty his pockets and drugs were found in his pockets. He claimed that the search at the station 2 hours after the arrest was bad because it was not incident to the arrest. And the Supreme Court of Missouri held it was a reasonable police station search incident to the booking process.

In a recent case from the Supreme Court of Massachusetts, the defendant was arrested at the scene of an auto accident, taken to the station, booked, and $1700 in stolen property was found in his pocket. Again, he

argued that this was not a search incident to arrest because it was made after the arrest and not at the scene of the arrest. Again, the court upheld it on the grounds that it was unreasonable not to search a prisoner at the station before putting him into a cell or custody.

So, in these instances all of the courts will hold that a second search is valid but not on the basis of a search incident to an arrest or a continuing search incident to arrest. This sort of search is reasonable simply on the basis that it is proper police procedure to make sure a defendant is carrying no contraband or weapons when he is put into custody in a police station.

Questions and Answers

James R. Thompson

QUESTION: An arrest is made outside a vehicle, one officer is involved, and a search of that vehicle is desired. Is it not true that when the officer leaves the vehicle to obtain a search warrant the car may be removed by a second party and the articles for which the warrant is obtained may be removed?

ANSWER: This may be true; however, if the defendant is not in the vehicle at the time of the arrest you cannot sustain the search as incident to his arrest. Circumstances do arise, nevertheless, in which you may search the vehicle even if the defendant is not inside: if you have probable cause to believe that the vehicle contains evidence of an offense and if you can demonstrate to the court that the vehicle or articles would be removed if the search were not made without a warrant.

In the *Preston* and *Cooper* cases the Supreme Court said repeatedly that the rules governing the search of a vehicle are different from those governing the search of a home because of the mobility of vehicles. Therefore, even if you do not arrest the defendant in his vehicle, if the vehicle is in a movable situation, if circumstances prevent you from getting a search warrant, and if you can demonstrate probable cause to believe that the vehicle contains evidence of an offense or contraband, the Court will probably sustain the warrantless search of the vehicle. However, you must demonstrate probable cause and the circumstances which prevented you from obtaining the search warrant.

QUESTION: In light of the *Winkle* case, if an officer makes a traffic arrest, and in the course of the arrest finds evidence of a crime having been or being committed, should the officer verbally arrest the person for "a crime" prior to searching the trunk? If so, what wording or procedure should he use to make the second arrest beyond the traffic arrest?

ANSWER: The validity of the search of the trunk would not be determined by whether the officer verbalized the second arrest. As long as the officer had probable cause to believe that another offense was involved, a search incident to that offense is reasonable, and if those facts appear in the record of the case, the appellate court would sustain the search as they did in the *Winkle* case.

It might not hurt, if you have a good idea of what the second crime is, to state to the defendant that he is also being taken into custody for this second offense. However, in some cases you might run a risk of guessing the wrong crime. If you guess that the second crime is stolen property and later the Supreme Court decides it is a stolen car, it might confuse the record.

QUESTION: With respect to permission being granted to search a car, the glove compartment, trunk, or the inside of the car, is it necessary to comply with the *Miranda* rule or a variation of the *Miranda* rule? In other words, could you merely ask permission to search the trunk without saying anything further as to the subject's constitutional rights, assuming permission was given?

ANSWER: A later lecture in this series is going to deal with consent searches; however, it is my opinion that police officers should start complying with the rationale of the *Miranda* warning. I am sure that the Supreme Court is going to require the type of *Miranda* warnings for consent searches in the future.

At the present time I have a case before the Supreme Court in Illinois in which my client, the defendant, gave written consent to search his home without the *Miranda*-type warnings. It is my contention that this consent is not valid.

Six courts in the United States have passed on this issue since *Miranda* and they are split: three stated that warnings must be given; three said they did not. It is my belief that the United States Supreme Court is going to require the warnings; however, these warnings are different from those in *Miranda*.

The warnings will have to be given because it is clear that you cannot take a defendant's confession without warning him of his privilege against self-incrimination. The police officer must tell the defendant that he need not speak, that anything he says may be used against him, and that he has the right to consult with a lawyer before speaking to the police. In addition, the defendant has the right to appointed counsel if he is indigent.

There is little difference between an interrogation case and the obtaining of a consent to search, in my opinion. In an interrogation case a defendant is protected by the Fifth Amendment from speaking unless he voluntarily and knowingly chooses to do so. In a search and seizure case the defendant is protected by the Fourth Amendment against giving evidence to incriminate himself. If, however, the search is carried out as a search incident to an arrest, with a search warrant, or with his consent, then he has in effect no Fourth Amendment protection. The only variation between the two cases is that in the Fifth Amendment (interrogation) case, he is giving verbal evidence against himself, and in the Fourth Amendment case the defendant is giving physical evidence against himself. If the Supreme Court in the *Miranda* decision said that you cannot knowingly waive your Fifth Amendment rights without being warned, I cannot see how you can knowingly waive your rights under the Fourth Amendment without being warned.

As a police officer today, before I took a consent to search, I would tell the defendant, if he is in custody, that he has the right, under the Fourth Amendment, to refuse a warrantless search of his house or vehicle, and that if he consents to the search, anything found in the search can be used in evidence against him. Additionally, before giving consent to search the defendant should know of his right to consult with an attorney, and if he is indigent, that he has the right to have counsel appointed.

In other words, give the *Miranda* warnings but adapt them to include both the Fourth and Fifth Amendments. Then, if the defendant knowingly waives his Fourth and Fifth Amendment privileges your consent to search will be valid.

QUESTION: May persons in a vehicle (other than the driver) refuse to identify themselves at the request of a police officer? What offense would they be guilty of?

ANSWER: As far as I know there is no law or regulation that requires the passenger of an automobile to identify himself. Therefore the passengers would not be guilty of any crime.

QUESTION: Under the following circumstances would the search be valid? The subjects were arrested on probable cause that they had committed the crime of forgery. A search of the car was initiated at the scene of the arrest and the arrestees' car was impounded. A search continued at the station for narcotics, and proof of the crime was found.

ANSWER: Most courts which have dealt with continuing searches have held that a search begun at the scene and then completed at some location other than the scene of the arrest, for whatever purpose, is a valid search simply because it is a continuation of the original search at the scene of the arrest. Therefore, if you had the right to make a search incident to an arrest at the scene of the arrest, and you continued the search at the station for some valid reason, this would be called a continuation of the original search.

There was a recent California case in which the search of a vehicle was begun at the scene of the arrest, but because a crowd was gathering and the vehicle was blocking traffic, the police took the vehicle down to the police station and completed the search there. The California Supreme Court held that this was a valid continuation of the original search and therefore the evidence discovered was admissible.

QUESTION: Is the evidence admissible in a case where the vehicle is seized as evidence in a hit and run accident, the driver has been arrested, and the vehicle is towed to the police station and searched?

ANSWER: As I mentioned in reference to the *Harris* case, the government attempted to justify the search on the alternative grounds that any

time the vehicle itself is an instrumentality in an offense, it could be treated as any other piece of evidence seized from the defendant and could be searched on that basis. The Court of Appeals for the District of Columbia refused to pass upon the validity of this argument and it may be passed upon by the United States Supreme Court shortly.*

Personally I think you would be safer in justifying the search of the vehicle at police station on the grounds that it was lawfully in the custody of the police, and that under the *Cooper* rationale they had the right to inventory it. Again I think the case demonstrates the importance of the police departments adopting uniform inventory regulations.

QUESTION: If the subject is arrested on a traffic warrant in the front room of his home, can a search be made of that room for weapons?

ANSWER: Yes, a search could be made for weapons in the area immediately surrounding and accessible to him, provided that a weapons search was reasonable under the circumstances of the arrest.

QUESTION: Would it not be the best procedure to have the arresting officer inventory the subject's car at the scene of the arrest and issue a receipt for the car and contents?

ANSWER: You could do this; however, suspicions may arise in the mind of the court because it was the arresting officer involved. It seems to me that there are some circumstances in which you might make an arrest in which it would not be practical to inventory the contents of the car at that time: the lone officer, who must deal with the defendant's custody and cannot search the vehicle at the same time, for example.

I think it would always be preferable to conduct the search at the police station, under the direction of someone other than the arresting officer: the inventory-control officer. However, this is not to say that a search incident to an arrest at the scene of the crime could not be followed by an inventory at the police station. Both of these procedures could be followed as was done in the *Harris* case.

QUESTION: This is a hypothetical case involving a vehicle which was towed to a police pound for prohibited parking. An inventory is taken at the pound and it is discovered that the car contained contraband. When the owner comes to retrieve his car an hour later what is the police officer's authority to arrest?

ANSWER: This would depend on the law of the jurisdiction governing the proof of, or presumption of, the possession of contraband. If the police officer found the car parked in a prohibited parking zone and, pursuant to police regulation or city ordinance, towed it away and inventoried it, the vehicle would be lawfully in their custody and therefore

*The Supreme Court did not pass on this issue in deciding *Harris*. —Ed

the search which revealed the contraband would be valid. If the owner turned up an hour later I think it would be reasonable to assume that he was in possession of the vehicle at the time it was towed, at least constructively, because he would not have realized so rapidly that it had been towed unless he had been driving it up to the time of this incident. Therefore, you have at least probable cause to believe that he was in possession of the car at the time it contained the contraband.

It is debatable as to whether this case would constitute sufficient proof beyond a reasonable doubt, if and when the trial on the charge of possession is held. However, it is at least probable cause to arrest him for the possession of the contraband.

QUESTION: How does the *Mapp* exclusionary rule affect Michigan's constitutional amendment excepting guns and narcotics seized by police officers outside the curtilage?

ANSWER: The provision of the Michigan Constitution, of which you speak, is not worth the paper it is written on after *Mapp*. Michigan may say that its law allows searches outside the curtilage for certain articles regardless of the fact that ordinarily that would be an illegal search and seizure. Michigan can do whatever it wants to in so far as the Michigan search and seizure procedure is concerned. However, if a search outside the curtilage violates the Fourth Amendment the evidence cannot be admitted at the defendant's trial even if the Michigan Constitution says it can. The Fourth Amendment controls and under the Supremacy Clause, any decisions, laws, or Constitution of a state which conflicts with the Federal Constitution is invalid.

Therefore, if you had a case where it is apparent that the search outside the curtilage is unlawful, and the trial judge admits that evidence in a defendant's trial on the state court level, which violates the Fourth Amendment, the Michigan Constitution cannot protect the action. The Supreme Court of Michigan has upheld the state's constitutional provision and the United States Supreme Court has refused to hear these cases. However, this does not mean that the Court is always going to refuse to hear these cases. Possibly they are awaiting a particularly flagrant search and then the same results will be handed down on the Michigan case as in the *Mapp* case. It is only a matter of time until the Michigan constitutional provision is ruled unconstitutional by the Supreme Court.

QUESTION: To what extent may a police officer go in determining the ownership of a vehicle in the street when the mororist is uncooperative, claims the title is locked in the trunk, and the driver will not produce the trunk key which the officer has reasonable cause to believe is on a ring attached to the ignition?

ANSWER: I suppose it would depend on whether or not the police officer had probable cause to believe that a stolen vehicle is involved. If

the officer had no probable cause to believe a stolen vehicle was involved he could not search the trunk. However, if reasonable cause did exist the officer can search the vehicle to determine ownership and if the comments of the arrested person indicated that evidence of ownership might be found in the trunk then a search there would be proper.

QUESTION: In your opinion, when impounding a car for safekeeping which the officer has observed parked in the same location for a week straight, how far may the officer go in checking the car?

ANSWER: Many communities and jurisdictions have laws regulating police conduct toward "abandoned vehicles." If, under your local rules or ordinances a car parked in the same location for a week without being moved, or without anyone being seen around it, is classified as an "abandoned vehicle" you could search the car to determine its ownership. I still must qualify this by saying that police action would depend on local ordinances and regulations, and upon what other evidence of abandonment exists.

QUESTION: If you make an arrest of the defendant in his vehicle but weather and lighting conditions do not allow for a good search at the scene, could that vehicle be brought to the station to be searched there?

ANSWER: If you made an arrest of a defendant in his vehicle and because of the conditions at the scene you were prevented from making a thorough search incident to an arrest, I think you could take the vehicle away to a place where the conditions would allow a good search incident to an arrest and have it classified as a continuation of the original search.

QUESTION: A subject's car is towed to the police station, the subject having been arrested for drunk driving, and an inventory of the car revealed a stolen gun found under the dashboard, behind the radio. Is this an inventory or a search, and if a search, is it a legal one?

ANSWER: When we say "inventory" we mean "search"; however, "inventory" may sound more reasonable. If you have an inventory of such length or thoroughness that you are looking under dashboards and behind radiators, it might suggest to a court that the police were not really inventorying but had something else in mind. The *Cooper* opinion states that if it is clear that the police are conducting something other than an inventory or are going beyond that which is necessary for a reasonable inventory, they are actually conducting a search and had best have probable cause, a warrant, or a search incident to an arrest.

Therefore, the answer is going to depend upon the facts of each case concerning how thoroughly the inventory is conducted.

QUESTION: Do the same rules of search and seizure apply to a conservation officer who, in performance of his duties, searches a boat

or a vehicle for game or loaded weapons?

ANSWER: Generally the answer is yes. The Fourth Amendment and probable cause rules are just as binding upon a game officer as it would be on any police officer.

QUESTION: What authority is there in regard to the taking into custody of an arrested person's vehicle when the defendant wanted his car locked and left at the scene on a road shoulder, or turned over to another person?

ANSWER: This question remains unanswered in either the *Cooper* or *Preston* decisions. I suppose a police department regulation which authorized the impoundment of vehicles belonging to defendants would stand a better chance against attack if it applied to those cases in which it was reasonable for the police to take the vehicle into their custody. This applies to those cases where the vehicle could not be left safely at the scene, where there was no area in which to legally park it, or where the vehicle itself had some connection with the offense for which the subject was arrested.

The United States Supreme Court has not told us what would happen if a man was arrested in his car for an offense which had no relationship at all to the car and the circumstances were such that he could safely leave the car there or turn it over to a friend. I think under circumstances of this sort the Court might say that the police have no right to take the car into custody and therefore they could not inventory it.

QUESTION: This is a hypothetical case in which two officers see a man, who is known to them, and the officers are aware that the suspect is wanted on a traffic warrant. When the officers stop the car which the suspect is driving the driver kept fooling with the arm rest. The officers arrested the man, placed him in the patrol car, returned to the defendant's car and found that in the hollowed out arm rest was a pistol. Was this a legal search?

ANSWER: This is a good borderline case. Some courts might rule that the search was not legal on the same basis as the *Reed* case from Illinois in which the only suspicious behavior was nervousness. However, in the *Reed* case the defendant was outside the car and his nervousness was displayed outside the vehicle. Additionally in the *Reed* case there was no evidence to believe that the suspect was wanted by or known to the police officers.

On the other hand, there is a recent case from the Supreme Court of California in which the police officers attempted to make an arrest for a traffic violation and the defendant fled at high speed, eluding the police for fifteen or twenty minutes and was finally apprehended after a crash. The California court ruled that under the circumstances it was reasonable

to believe that this was something other than an ordinary traffic violator and there was probable cause to believe there was something in the car that might be evidence of an offense. For this reason, the court sustained the search.

Apparently your hypothetical case is right on the borderline between the cited California and Illinois cases. You might be closer to the California case because the defendant was in the car fooling with the arm rest. If, in fact, he had attempted to evade arrest on the traffic offense that might be the determining factor. Under the circumstances, based upon these facts, as a police officer I would go back to the vehicle and search, simply on the theory that the search might be good. In any close case, as in this example, go back and search – you would be foolish not to. Yet when it is clear that the search will be held bad, do not search.

You must realize that the Supreme Court is becoming aware of the fact that their consideration of search and seizure cases is much different from that of the police officer. The police officer, in some instances, may have thirty seconds to make up his mind as to whether or not to search. In these 30 seconds he is expected to know all the laws of search and seizure from the state jurisdiction and the Supreme Court, and, weighing all the various cases, come to the right decision. The Court sits in Washington and has able lawyers appear before it with written briefs, and law clerks to look up the laws. With all of this it may take the Court four to five months to come to a conclusion. Therefore the courts are now taking into consideration the fact that (a) the police officer has to make a quick decision, and (b) police officers are specially trained people. This special training, the court realizes, may make circumstances which would not appear suspicious to the ordinary citizen seem highly suspicious to the police officer by reason of his training and experience. This feeling applies in determining cases of probable cause. Therefore, if you have a close case in which you think there is a chance that a search will be sustained, go ahead and search.

QUESTION: Do you feel that the police may hold as evidence in a drunk driving case, a full six-pack of beer found in the car operated by the defendant? Should this beer be held in the absence of a departmental administrative policy to inventory property held in drunk driving cases?

ANSWER: Yes!

QUESTION: How far can you go in using anonymous information in establishing probable cause either for an arrest or for a search warrant?

ANSWER: I suppose that by anonymous information you do not mean information coming from an informer who is known by you but whose identity you are not going to reveal, but information which comes from an anonymous source, a source unknown to you.

Under these conditions the courts have generally held that anonymous information by itself will not constitute probable cause. However, that anonymous information which is corroborated in some manner may constitute probable cause. Therefore, if you receive anonymous information and conduct an investigation or surveillance which turns up corroborating information, you may very well have probable cause. Yet the anonymous information by itself does not determine probable cause.

QUESTION: In the example given of a single officer making a traffic arrest wherein the vehicle contained three or four subjects and the area was considered dangerous, am I correct in believing that a weapon search will be sustained? Can you get the subjects out of the vehicle in a line-up search or must the search be made while all subjects remain in the vehicle?

ANSWER: Take the subjects out of the vehicle, line them up against the car, and then conduct your search. The fact that this is a high crime rate area may be a strong supporting factor.

QUESTION: How do you establish the reliability of an informant if this is the first time he has been used?

ANSWER: If this is the first time you have used an informer, then you cannot point to anything in his background which would allow you to say that he has given previous information or that he has in the past acted reliably. Therefore, you are going to have to corroborate his information either with information from someone else, as a result of independent police investigations, or surveillance.

IN-FIELD INTERROGATION: Stop, Question, Detention and Frisk

by Richard H. Kuh*

Back some twenty-five hundred years ago, in Delphi, another small city in a great State, one located at the foot of Mount Parnassus — the ancient city that was also, like this one, a seat of learning — persons deeply concerned with the future were wont to consult with the oracle.

Within the next few months, the United States Supreme Court, located in a white marble temple in our Capitol, is to hear argument and to decide upon the constitutionality of New York State's stop and frisk statute,[1] and of the case law in at least one other jurisdiction[2] that permits police to stop and to question suspiciously acting persons without arresting them — and to do so on something *less* than probable cause to believe that they have committed a crime.

I am unlike the bridally decked virgin priestess at Delphi — in many ways — whose incoherent sounds were translated into prophecies by verse speaking priests. Here, in central Michigan at the conflux of the Grand and the Cedar, I cannot prophesy. And I shall do my best to be coherent. Washington *may* — shortly — tell us whether stopping (and frisking) is constitutional. Attempts at crystal-gazing by me, when far more authoritative resolution appears to be on the horizon, would be bootless. I speak here with the discouraging near certainity that what I say today is written in sand — with the breakers from Washington already forming that may eradicate my words.

A number of observations on in-field interrogation — police stopping, questioning, frisking, and even briefly detaining suspects are none-the-less in order. The possibility — and it is only that — exists that some slight

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[1] Probable jurisdiction has been noted by the Supreme Court in two New York cases. See People v. Sibron, 18 N.Y. 2d 603 (1966), prob. juris. noted, 386 U.S. 954 (1967); People v. Peters, 18 N.Y. 2d 238 (1966), prob. juris. noted, 386 U.S. 980 (1967). New York's stop and frisk statute is section 180-a of the New York Code of Criminal Procedure.

[2] Certiorari was granted in one case involving decisional law recognizing a stop and frisk right, upon reasonable suspicion. See State v. Terry, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966), *cert. granted sub. nom.* Terry v. Ohio, 387 U.S. 929 (1967).

echo of my words may reach remote Washington. And, apart from that, until — and unless — Washington changes the rules, police still have daily chores in the apprehension of criminals and the prevention of crime.

The Miranda Decision

For the moment, in-field interrogation — quite limited questioning of suspects by police at the moment they are stopped — does not appear to be barred by the United States Supreme Court's 1966 *Miranda* decision.[3]

Miranda talks in term of "custodial interrogation," and the Justices' lengthy opinion stresses that in the four cases then considered, the questioning took place at the stationhouse. This is not to suggest that if persons are subjected to more than a few moments of questioning on the street, or in a police car, or in a hallway, or in their own homes, or in any place other than the police station, that it cannot be held to be "custodial," but it seems to suggest that the holding of *Miranda* was *not* meant to apply to informal, spontaneous, and brief street corner interrogation. There is a good deal of language in the United States Supreme Court's opinion (written by the Chief Justice) that bolsters this conclusion. The *Miranda* court addressed itself to the problems of persons "taken into custody or otherwise deprived of . . . freedom of action in any significant way," of a person questioned "in a room in which he was cut off from the outside world," of interrogations that "have largely taken place incommunicado," of "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," and of "circumstances surrounding in-custody interrogation [that] can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."

Moreover, the *Miranda* court stressed, in several ways, that it did not mean to impede such law enforcement as might take place without appreciable potential for coercion. The United States Supreme Court stated: "We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." It stated, "Our decision is not intended to hamper the traditional function of police officers in investigating crime . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding," and "our decision does not in any way preclude police from carrying out their traditional investigatory functions."

I believe, therefore, that — at least until we hear more from the United States Supreme Court — we can safely say that immediate and brief street-corner investigation on reasonable suspicion is not banned by *Miranda*.

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

The Police Preventive Function

A problem I have with the stop and frisk controversy is that many of the antagonists – on *both* sides – regard stop and frisk principles as controlling *police action on the street* rather than controlling *judicial action in the courtroom.* Although, at first blush, it might seem that they are correct, I strongly believe that, realistically viewed, they are largely mistaken. The *major* impact of the stop and frisk laws and decisions – whether they are ultimately sustained or washed away – is likely to be in the courtroom, on motions to suppress and on trials, rather than on police conduct in the street.

Why do I say this?

In tendering this observation, I do not suggest that it is proper for police to ignore our high Court's decisions, and that little that the Court ever does has real bearing on police conduct in the street. That, emphatically, is *not* the case. I, and I am sure you, strongly condemn these few police who evade, in one way or another, American judicial decisions that are intended to bind them. But I believe that the ambivalence that deeply enshrouds the stop and frisk area is such that decisions in that area will have far more impact in the courtroom than they do on the street corner.

Let me be more specific concerning that ambivalence.

I am convinced that our courts and our legislators – and, of course, the citizenry at large – expect (indeed, demand) police to take *preventative* action. As long as those expectations continue, whether or not stop and frisk is formally retained, police will have to continue to stop persons and to ask questions when their suspicions have been understandably aroused. Thus I expect police to continue to act in this fashion – regardless of the United States Supreme Court stop and frisk action – unless the Court states unequivocally and broadly that police are *not* to engage in streetside *preventative* action. And I never expect to hear any court anywhere say that.

This is at the heart of the ambivalence. At least one Governor in exercising his veto power,[4] and some legislators in opposing stop and frisk legislation have indicated, and a court may follow suit and may say, that the police may not stop (and frisk) suspects on less than probable cause. Yet all expect police to use their special expertise, in the street and elsewhere, to continue to act to prevent crime. Yet how one can perform the praiseworthy (the streetside protection) without, on occasion, also performing the damned (the stopping and frisking on mere reasonable suspicion) is something that those who would severely limit police power have never troubled to explain.

[4] See Illinois' Governor Otto Kerner's August 17, 1966 veto of House Bill No. 1078.

Let us glance at some of the situations in which even the most doctrinaire civil libertarians, legislators, governors, and judges — and other persons with their political index fingers pressed equally tightly upon the pulse politic — would without hesitation agree that police investigatory action was appropriate. Yet in each of the situations, unless we are to strain and to distort the clear meaning of words, I think we must agree that a police officer would not in fact have "probable cause to believe" that *a particular crime* was being committed — today's *arrest* standard. At best he might have the strongest grounds for "reasonable suspicion" of crime — the legal litmus for stop and frisk:

(i) A patrolman on his beat hears a scream — its origin unidentified — and moments later sees someone leaving the apartment building from which the scream seems to have emanated. Is not the officer's obligation to stop that person, and to detain him — momentarily — with either a few seemingly pertinent questions, or while the source of the scream is being checked? No probable cause to believe a crime has been committed; clear basis for reasonable suspicion.

(ii) A police officer happens upon a dead bloodied body; next to it stands a stranger. Although the bloodied corpse may be the result of suicide or accident, and the live body next to it may just as likely be a would-be rescuer as an evil-doer, hasn't the police officer at least an obligation to put a few questions, and momentarily to detain the quick while the dead is being investigated?[5] Again, no probable cause exists to believe a crime has been committed, but there is a clear basis for reasonable suspicion.

(iii) At 1:30 a.m., in one of our busy cities, a police officer sitting in a parked unmarked vehicle, observes — for a period of ten minutes or thereabouts — two persons. They are walking back and forth scrutinizing a store window, and are whispering together intermittantly, conduct that suggests to the knowing that they are "casing" the store. They glance toward the officer, seemingly become aware of his interest in their interest, and hurriedly take off. Is the officer expected to say, "Ah, well," and to drive off in the opposite direction? Or is he expected to make some effort to halt them and to make some inquiry concerning their conduct?[6] Yet once again, he has no probable cause to believe a crime has been committed, but has a clearly reasonable basis for suspicion.

(iv) A freedom walker, a James Meredith, in the summer of 1966, hikes miles along a Mississippi road in the spotlight of the nation's television and press. Law enforcement personnel patrolling the road immediately ahead of his march see a man carrying a shotgun, loitering along the road-

[5] Hypotheticals (a) and (b) in the text were posed by Kaufman, J., in his opinion in United States v. Bonano, 180 F.S. 71, 78-79 (S.D.N.Y.), *rev'd on other grounds, sub. nom.* United States v. Buffalino, 285 F. 2d 408 (2d Ci2.1960).

[6] Virtually this same set of facts existed in both the cases of People v. Rivera, 14 N.Y. 2d 441 (1964) and State v. Terry, *supra*, n. 2.

side. Not only is possession of such a shotgun in public completely lawful under the laws of almost all of our states (including Mississippi), but in rural areas in the South such possession is common, far less out of the ordinary than it might be on the streets of New York City. Hasn't law enforcement some obligation, at least to question the loiterer? Yet here too there is no probable cause to believe a crime has been committed, but a basis for suspicion of impending crime is clear.

(Parenthetically, let me note here that a justly respected New York Congressman, one of that House's most vociferous civil libertarians, one who rushed to the injured Meredith's bedside and promptly thereafter decried law enforcement's failure to have anticipatorily disarmed the assailant, had been one of New York State's most vocal antagonists of stop and frisk legislation, charging when it passed that "what no demagogue or dictator could do, the Republican-controlled New York State legislature has done." Yet had Meredith's march been in New York City, not Mississippi, and had his assailant paraded the exposed shotgun through Times Square, he would have violated no law, and in the absence of police powers to conduct in-field inquiries on less than "probable cause," stopping and questioning would have been illegal.)

(v) Translate the Meredith situation to the streets of New York City. But place it near the United Nations, or along the line of the motorcade from the particular communist embassy that happens to be involved when a Khruschev or a Castro is visiting. Is there no police obligation to question a "casual" New York City rifle or shotgun toter, and even to keep him off the streets — and away from windows — during such a state visit?

(vi) Past midnight on a holiday morning, in a commercial area of a busy city, several persons are observed, straining while loading an extremely heavy and bulky object into the trunk of an automobile; the car is parked, its engine running. Should not police investigate and ask questions? (Police investigation in fact was to disclose that the heavy object was a safe, stolen by burglars from a store closed for the holiday.[7]) Here, too, no probable cause existed, but there was a sure-fire case for reasonable suspicion.

(vii) On a weekend, near a Railway Express Agency (R.E.A.) warehouse, an employee observes a stranger hand-carrying a large cardboard carton bearing "R.E.A." labels. Police are contacted. Is some inquiry by them not appropriate?[8] Suspicion? Yes. Probable cause? No, if we are to use the words accurately.

And so on. And so on.

[7] The case is People v. Cassone, 20 A.D. 2d 118 (1st Dept. 1963), aff'd, 14 N.Y. 2d 798, *cert. denied,* 379 U.S. 892 (1964); almost identical facts existed in People v. Wolfe, 5 Mich. App. 543, 147 N.W. 2d 447 (Ct. of App. 1967).

[8] The case is United States v. Lewis, 362 F. 2d 760 (2d Cir. 1966); a strongly similar case is Commonwealth v. Lehan, 347 Mass. 197, 196 N.E. 2d 840 (1964).

In each of these — and in hundreds of similar — situations, regardless of what the United States Supreme Court may do to the judicial blessings some lower courts have bestowed on stop and frisk rights,[9] our American communities will continue to expect our police to act. And our most dedicated policemen in the field, not having been told that police have no preventative role — *not having been instructed that they are to act only when they have a reasonably sure thing* — will continue to take action. It would be grossly unfair to serious, honest, law abiding police, and to the communities they serve, were the courts, through stumbling language ambiguities or the misfortune of multiple opinions producing no clear majorities, to place law enforcers in the position that tells them, on the one hand, that they are to continue to take sound preventative action in the street when their suspicions are — reasonably — aroused, but then, on the other, that damns them in the courtroom as law violators once that action has been taken. Hopefully no court will distort Voltaire, saying to policemen in effect, "I must state that I disapprove of what you do, but I will fight to the death for your obligation to continue to do it."

Avoidance of the Stopping-on-Suspicion Dilemma

If I am right in believing that the police have a bona fide crime prevention function, and that an important aspect of that function is often the ability to stop persons who are — reasonably — suspected of being engaged in or being about to engage in criminal activity, and yet if we recognize that that stop and frisk right seems to be presently in serious jeopardy in the courts, we must seek out approaches that may harmonize stop and frisk duties with potential stop and frisk prohibitions. But to state the problem, as is obvious, is to underscore its absurdity. Reconciliation of a duty with a diametrically opposed prohibition is impossible. The attempts that have been made at a rapprochement are, none of them, the least bit satisfactory.

I have seen three different approaches towards tolerating stop and frisk while simultaneously denying it any recognition.

The first is the method that seems to have been embraced here in Michigan. With no intended discourtesy to my host state, I must observe that this first method is obviously an intellectually wholly dishonest one. Here in Michigan the appellate courts, while paying lip service to a principle that bars police from stopping on mere suspicion, have ratified such stopping by straining the concept of "probable cause" past the breaking point. In 1962, in *People* v. *Williams*,[10] Michigan's highest court ele-

[9] Apart from the New York and Ohio decisions soon to be reviewed by the Supreme Court, and Commonwealth v. Lehan, *supra* n. 8, there are a number of unequivocal California decisions approving stopping on suspicion. See, e.g., People v. Mickelson, 59 Cal. 2d 448, 380 P. 2d 658 (1963); People v. Garrett, 47 Cal. Rep. 731 (D.C.A. Cal. 1965). Other stop and frisk authority also exists. See, e.g., de Salvatore v. State, 52 Del. 550, 163 A. 2d 244 (1960); Kavavagh v. Stenhouse, 93 R.I. 252, 174 A. 2d 560 (1961), *appeal dismissed*, 368 U.S. 516 (1962).

[10] 368 Mich. 494, 118 N.W. 2d 391 (1962), *cert. denied*, 373 U.S. 909 (1963).

vated conduct that the trial record had described in terms of "suspicious looking" to conduct constituting grounds of "reasonable belief" that a crime had been committed. And this year, in *People* v. *Wolfe*,[11] your Court of Appeals followed that lead. In a situation in which a good citizen of Battle Creek reported seeing men load a safe into a car trunk at 4:50 in the morning, and in which police tipped by that citizen followed the car, stopped it, and arrested the defendants, *later learning* that the safe had been stolen, the appellate court held that probable cause had existed. It did so after approving a legal writer's comment that suspicion was inadequate to justify stopping and interrogation. How much simpler it would have been for all (judges, police, prosecutors, defense counsel, and defendants), how much more helpful it would have been to all in predicting future legality of police conduct, and how much more intellectually honest it would have been, were this state's courts to have conceded the lawfulness of stopping and interrogating on reasonable suspicion. The nonsensical Procrustean task of fitting obviously reasonable and proper police conduct into a frame that ostensibly disowned such conduct could have been readily avoided.

The second method of sanctifying stop and frisk without seeming to do so has been followed by New York State's Intermediate Appellate Court in a factually remarkably similar case. In *People* v. *Cassone*,[12] a safe stolen and transported in the nighttime was also involved; there a policeman observed the suspicious car loading from a distance, pursued and caught the vehicle, and thereafter learned that the burglars in it had stolen a safe and were making off with it. In sustaining the alert police conduct there involved, the New York court engaged in a neat bit of incomprehensible double talk, ratifying the police action without expressing any general principle under which it did so. The case affords absolutely no guidance for future police action. And although New York State's highest appellate court has *since* unequivocally sustained stop and frisk, it too has engaged in this same sort of legal legerdemain in which the methods of achieving a result are invisible to all onlookers. In 1964, in *People* v. *Pugach*,[13] that court sustained police who opened a lawyer's briefcase that had been taken from the attorney after he had been taken into custody; a loaded gun was found in the bag. The search took place at a time when the attorney was sitting in a police car, surrounded by his custodians. The court expressly declined determining whether the lawyer was under lawful arrest at the time such that the search might have been sustained as incident thereto. Rather the judges merely stated that, under all the circumstances there present, the search of the defendant's briefcase, he being in custody, was proper.

[11] 5 Mich. App. 543, 147 N.W. 2d 447 (1967).
[12] 208 A.D. 2d 118 (1st Dept. 1963), *aff'd*, 14 N.Y. 2d 798, *cert. denied*, 379 U.S. 892 (1964).
[13] 15 N.Y. 2d 65.

The third method for sustaining seemingly reasonable and proper and mandated — but technically potentially unlawful — police conduct is a method in which all the twisting is done by the police, not by the judges. The means are so-called "white lies," articulated on the wholly unsound and dangerous premise that the end can justify the means: that if the law is too rigid, its rigidities can be "softened" by a compensatingly elastic police concept of honesty. The Reverend Sydney Smith more than a hundred years ago commented upon the great difficulty of *not* praising where praise was *not* due, a difficulty I know that some of you may have experienced, for instance, upon meeting judges for whom your respect was other than unbounded. In the same spirit, I hope that here — before a police audience — I may comment candidly on this situation that we all know exists to some extent, if not quite as widely as my brothers of the defense bar would have us believe. There are policemen, many policemen, who will perform minor "surgery" upon the facts when the time comes to testify in a suppression hearing in order to anticipate and overcome weaknesses that may render their seizures vulnerable.

Was the defendant from whom contraband was taken riding in a vehicle? Excellent. Then we will hear how the vehicle had made a forbidden U-turn, or had failed to stop at a traffic signal, and how the stuff was found sitting openly upon the front seat. Was the defendant on foot, but ultimately found to be in possession of banned drugs? Excellent. Then, we will be told, that at the officer's approach, he reached into his pocket and tossed away the narcotics — thus avoiding an illegal search problem.

Was a concealed weapon involved? Excellent. Then as the officer approached and beckoned the defendant, rather than remaining mute or ignoring the officer, the defendant reached into his pocket and started to pull the weapon on the policeman. The illegal search problem thus evaporates. And the gulf between "probable cause" to believe a crime has been committed and reasonable suspicion of criminal conduct is one readily bridged by discreet post-arrest beefing up of the facts, in this manner, that truly appeared at the time of the stopping.

Such police dishonesty is never excusable. But recognizing its inexcusability, and urging upon police that the end can never justify the means, does not set the situation neatly to rights. The frustrated policeman who cannot countenance the freeing of culprits when his effective use of his trained instincts has served to protect his community is all too likely to do combat with the law's absurdities through crude and dishonest self-help: by manufacturing the necessary compensating evidence.

None of these three approaches, then, at reconciling police stopping on suspicion with law that may disavow such stoppings is satisfactory.

The Dangers of Police Stopping on Suspicion

Police, courts, and legislatures, all designed to serve our citizenry, share (I hope) an interest in isolating and eliminating the harms of stopping on suspicion, and in finding ways of simultaneously legalizing such stoppings in those instances of which I spoke earlier, instances in which most persons — including civil libertarians — in our communities would agree as to their necessity.

What are some of the dangers inherent in police stoppings on suspicion?

The Task Force Report on The Police, issued this year by the President's Commission on Law Enforcement and the Administration of Justice, although favoring the right of police to stop suspects and possible witnesses, and to detain them for brief questioning if they refused to cooperate voluntarily, has noted a major danger of such stoppings:

> Misuse of field interrogation . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident. The Michigan State survey found that both minority group leaders and persons sympathetic to minority groups throughout the country were almost unanimous in labelling field interrogation as a principle problem in police-community relation.[14]

The same note is more pointedly sounded in a brief submitted to the United States Supreme Court by the Legal Defense and Educational Fund of the National Association for the Advancement of Colored People:

> The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged.[15]

Whether or not the evidence is, in fact, "weighty and uncontradicted," at least here in the North does not really matter. Obviously there are some police who abuse their power to impose their personal prejudices — just as there are judges, lawyers, libertarians, and journalists who similarly abuse their powers. What *does* matter is that leaders of our ghettoed minorities and civil libertarians, acting in complete good faith believe this to be so. And political opportunists unfortunately stand ever-ready to take up and to amplify their cry. (When New York State's stop and frisk statute was awaiting our Governor's approval, a rally, with ample political backing, distributed a leaflet printed in English and in Spanish that falsely proclaimed, "Do you know that the State legislature has passed a bill

[14] p. 184.
[15] p. 3.

giving the police the power to stop, question, and search you whenever and wherever they want?")

What can you, police in a great northern state, do about the *claimed* police abuses towards Negroes that allegedly take place under the guise of stopping, frisking, and interrogating on "suspicion"?

As police-community mutual confidence is vital today to effective law enforcement, and as the *appearances* of police abuses towards minorities are likely to influence appellate judicial thinking (whether or not there are such abuses) you cannot simply smugly brand the claims of abuse as "false," and sit back and ignore them. Police must cope through "positive thinking" if you will — and positive acting — with minority allegations that police powers to stop persons on suspicion serve to justify the harassment of Negroes and of members of other ghettoed minority groups.

I hope it will not seem platitudinous for me to urge the importance to you that police, *consciously,* lean over backwards to see that police "stopping" power is not abused in police-minority dealings. The potential for seeming abuse, even by the most conscientious among all of us, is considerable. Look at just a few not uncommon situations in which the well-trained white policeman, one with the finest of instincts, will have to take extraordinary care lest, in exercising his power to act upon suspicion, he treats Negroes, or other members of minority groups, as second-class citizens.

(i) A white policeman's beat is in one of America's racial ghettoes. He (or he and his partner) is aware of his "aloneness"; he is aware of prior troubles in the area, of the potential for bricks being thrown from hostile roofs, of quick tempers likely to be ignited by the summer's heat acting upon decades of injustice. Will he not be far more nervous, far more likely to react decisively and actively — and possibly unfairly — to stimuli that, in other parts of town, would at most provoke his further observations?

(ii) A couple not previously known to the policeman is seen arm-in-arm heading towards a hotel. If that couple is interracial, and the girl is a Negro — assuming the incident is not in one of our beatnik communities — would not the officer immediately assume she is a prostitute, working her trade?

(iii) Unshaved, and in open neck shirt, a man is seen at the wheel of a 1967 Lincoln. If he is white, is not his appearance likely to suggest a successful man on his days off; if he is a Negro, is there immediate suspicion that possibly the car is stolen?

(iv) Late at night, in a white community, a Negro is seen carrying a package. Is this not likely to provoke suspicion (even though many Negroes may work — if not live — in that community), while the sight of a white man under the same circumstances will not?

The likelihood that law-abiding Negroes, resident in Negro communities, will be stopped on "suspicion" by police is increased by the simple fact that many of our Negro residential areas are high-crime areas. One of America's least doctrinaire and most imaginative appellate judges, Charles D. Breitel of New York, has noted, in favoring stopping on suspicion, that the most likely victim of street crime is likely to be the poor and members of minority groups.[16] But even if such stopping in our Negro ghettoes may be for the necessary protection of their Negro residents, it can none-the-less be galling to the innocent man whose freedom of action is interfered with. Professor Jerome Skolnick, after close observations of an excellent California local police force, commented:

> If an honest citizen resides in a neighborhood heavily populated by criminals, just as the chances are high that he might be one, so too are the chances high that he might be mistaken for one. . . . Thus, behavior which seems 'reasonable' to the police because of the character of the neighborhood is seen by the honest citizen in it as irresponsible and unreasonable. About *him*, more errors will necessarily be made under a 'reasonableness' standard. Indeed, the fewer the honest citizens in such an area, the more the police will be perceived by them as 'brutal,' 'offensive,' 'unreasonable'; and justifiably so, because the chances are in fact greater that the police will treat honest citizens as criminals.[17]

Although you and I favor reasonable police power, and believe generally that the added "inconvenience" that stop and frisk laws involve is a small price to pay for the added safety of police preventative action, we must recognize that far more "inconvenience" might be our burden were we members of a racial minority and if the local police failed to engage in extraordinarily conscientious soul-searching before they stopped us, possibly repeatedly, on some street-corners, claiming "reasonable suspicion."

Let me, however, before getting on to suggesting particular "guidelines" for police action, go on the defensive – briefly – in dealing with the claim that this police power of stopping on suspicion, is one used abusively against members of our ghettoed minorities. I have already – candidly – recognized with you the potential for such abuse, even by the most conscientious police officer. And when the potential is that great, we must recognize that there are certain to be an appreciable number of instances in which that potential is realized and becomes reality. Yet I believe that the complaints noted in *The Task Force Report on the Police* (of the President's Commission on Law Enforcement) and in the N.A.A.C.P. Supreme Court brief recently filed overstate the case.

In New York State, stop and frisk has had express statutory ratification for more than three years now, since July 1, 1964. When New York's

[16] See debate at the American Law Institute reported in 34 U.S.L.W. 2642, 2643 (1966).

[17] Skolnick, *Justice Without Trial* 218 (Science Edition 1967).

statute was passed, and signed into law by our Governor, the shrill cries of libertarians, of parts of our press, and of a chorus of politicians suggested that our state had determined to go Alabama's cattle-prod brandishing Bull Connor one step better. Immedately a so-called Emergency Committee for Public Safety announced its pledge to "proceed to establishing and providing free legal dissent for any persons oppressed under the new laws,"[18] and a powerful Negro political leader flung the gauntlet at our Governor, and New York City's Mayor, its Police Commissioner and District Attorneys, stating that " A constant vigil will be kept on the situation and if we find that there is abuse of authoriy, we shall act to declare these laws unconstitutional."[19] Although various groups have tried to keep stop and frisk antipathies boiling during these three years since the law's passage, and have annually sought — unsuccessfully — its repeal in the state legislature, their lack of success in finding any cases that dramatize the evils they foresaw strongly suggests that in fact the law's abuses have not been significant. When both libertarians and political leaders offer free legal service, when they publicize their offers, when they strive manfully to keep the target of their distrust before the public at large and before their adherents in particular, and when — ultimately — they come up with virtually nothing, that is a strong indication that there is nothing for them to come up with. Neither of the two New York State cases about to be reviewed by the United States Supreme Court appears to involve slap-dash arrogant police action against members of minority groups, and I know of no particular case — as opposed to broad condemnatory generalities — in which it has even been alleged that the New York stop and frisk power has been misused discriminatorily.

Guidelines for Police Stopping on Suspicion

If some prayer is to remain that the right of police to stop on reasonable suspicion be preserved, police must strain to see that the possibilities of abuse of that power be minimized.

There are three cautions I can suggest — two general, and one far more particular — for minimizing the potential for abuse.

The first I have just foreshadowed. Police must have driven home to them — early and often — the special needs of leaning over backwards when stopping members of racial or ethnic minorities on claimed "reasonable suspicion." Stopping on suspicion must not be permitted to become — or to *seem* to become — a tool of racist oppression.

The second caution is that when such stopping on suspicion takes place the officer must depend upon his badge and uniform — and upon the *potential* for exercising authority that they evince — as his authority.

[18] N.Y. *Post*, Mar. 4, 1964, p. 3, cols. 4-5.

[19] June 30, 1964 letter from Assemblyman Mark T. Southall to Police Commissioner Michael J. Murphy, Governor Nelson A. Rockefeller, Mayor Robert F. Wagner and District Attorney Frank S. Hogan.

Neither bullying nor patronizing are in order. He must, in his manner, conduct himself with the diffidence appropriate to police in our American democracy. It may seem absurd to expect a policeman when "ordering" someone to stop and answer a few questions, to do it politely. Yet London police are renowned for their courtesy, and the "politeness quotient" evinced by American urban police, at least in dealing with whites, has been constantly improving; ever increased courtesy is in order in dealing alike with whites and with members of minority groups.

That stopping on suspicion, particularly should it happen repeatedly to law abiding members of a minority, can become uniquely abrasive when coupled with rudeness, is evident when one considers the experiences of a white professor of law at Yale, Charles Reich. Writing about a year ago in the Yale Law Journal, Professor Reich noted:

> On one occasion when a patrol car flagged me down for a routine check on Route 2 near Boston, the officer, after ascertaining my name by looking at my driver's license said, 'What were you doing in Boston, Charlie?' Then he continued quite deliberately to address me in that fashion . . . . On several other occasions . . . I was either called by my first name or addressed in a way that was intentionally familiar. Nor am I unique in having such experiences. My brother a psychiatrist, his wife, and a lady friend, also a psychiatrist, were driving through Keene, New Hampshire earlier on a Sunday evening after a weekend in Vermont. A policeman stopped them — for no reason. He made all of them get out of the car and stand in the rain. He called my brother by his first name. After looking at identification papers belonging to their friend, he said, in a tone that carried insult, 'What kind of doctor are you, Ellie?'[20]

No basis — other than abysmal judgment and habit — exists for this sort of treatment by police. Griping about it may seem petty. But it is not the sort of condescension to which persons should be exposed who, having been stopped on suspicion only, quite possibly are completely law-abiding. And the insult is far more pronounced when those on the receiving end of such treatment are members of a minority group.

My third suggestion is that all police departments should formulate detailed guides for their personnel as to when stopping on suspicion is in order, and just what is to be done when persons have been stopped. Such guidelines are particularly necessary as the policeman on the beat is likely to be confused by the conflict of which I have spoken, between his duty to take preventative action and, possibly, his right to act only on "probable cause."

When, in 1964, New York State passed its own stop and frisk statute, we took steps to inform the more than 50,000 police officers and sheriffs in the state — in considerable detail — as to just what was expected of them under our then new law. These steps were taken through an organi-

[20] Reich, *Police Questioning of Law Abiding Citizens*, 75 Yale L.J. 1161, 1163-64 (1966).

zation, the New York State Combined Council of Law Enforcement Officials, that — at the time — I had the honor of heading. The Council consisted of representatives of all of our state's enforcement agencies, police, sheriffs, prosecutors and others, joined together for the common purpose of getting appropriate police powers through legislation. In drawing upon the New York history, I suggest to you in Michigan that there is no need for you to await the enactment of a stop and frisk statute here before you endeavor to spell out precise limitations upon police stopping on suspicion. (Nor is there any need to wait until the Supreme Court rules on the arguments it is shortly to hear — the high Court ruling *might* be as much as nine months away.) You have the *Williams* and *Wolfe* decisions to which I have earlier referred that, while nominally abjuring stop and frisk, show that in practice your appellate courts will permit *reasonable* police pre-probable cause investigatory action. You in police command positions can put flesh on the uncertain skeleton that those — and other — decisions create. Your field personnel will then have valued guidance as to the stopping of persons when, candidly, they lack probable cause to believe that those persons have committed a particular known crime.

Commenting upon the difficulties of giving policemen field guidelines for action, but upon the importance of such guidelines, the Report of the President's Commission noted:

> . . . defining the amount of objectively based suspicion that justifies a 'stop,' in such a way that the definition will be of some help to a patrolman on his beat, takes much thought and much expertise. However, it is by no means impossible. The bulletin of the New York State Combined Council of Law Enforcement Officials affords the patrolman practical guidance for his actions, including examples, factual variables, and guiding principles. In effect, this carries a New York 'stop and frisk' statutory provision into the street situations in which it is administered.[21]

You have been given copies of that portion of the Combined Council's guidelines that deals with New York State's stop and frisk law. Although you have no stop and frisk statute here, and although ostensibly your courts have disowned police action on "suspicion" — while recognizing it covertly by too readily finding that reasonably suspicious circumstances are the equivalent of "probable cause" — these guidelines may serve you here in Michigan by suggesting reasonable limitations upon police field conduct, and by supplying signposts for affirmative police action in the street.

In discussing our guidelines with you, I cannot reel off case law that has set the limitations, or that has authorized the activity, that they suggest. As you know, and as I attempted to underscore at the beginning of this talk, the legality of police in-field action — under any circumstances — upon less than "probable cause" is now under question before the

[21] *The Challenge of Crime in a Free Society* p. 103-04 (1967).

United States Supreme Court. To the best of my knowledge, most of the fine factual permutations and combinations that will understandably spark police suspicions, have never been litigated in any of our appellate courts. In formulating the guidelines, we tried to dope out — dispassionately and without being unduly pro-police or pro-suspect — what we thought most persons would agree was reasonable authority, and what were reasonable limitations upon authority, for police to exercise. Some of you will think we have been too restrictive; as is obvious from the pending appeals, others feel the entire concept of police stopping on suspicion is far too permissive.

The guidelines underscore several common-sense general principles. They stress that policemen are not permitted to stop just any passer-by and search him; the search of a person is not authorized merely because he has a criminal record; the stopping and searching of any person found in the vicinity of a crime scene, merely because he happens to be there, is not authorized; the need for adequate observation and investigation, under all the circumstances, is not dispensed with.

One sound general rule-of-thumb is that an officer is not to stop anyone unless he is prepared to explain with particularity his reason for so doing. (This, of course, is not to suggest that he must make entries in a little notebook before acting, but simply that he must draw on his disciplined powers of observation and of sensing things that are out of the ordinary, and be able to articulate just what it was that attracted his attention and that seemed amiss; merely stating, without explaining why the defendant "aroused his suspicions" is inadequate.)

Our guidelines specify that persons are only to be stopped when felonies and certain major misdemeanors are suspected. This is the requirement of our statute. But it makes sense, quite apart from being a legislatively enacted restraint. As stopping on reasonable suspicion — rather than on probable cause — involves a substantial possibility that wholly innocent persons may be stopped, it is a power that is to be sparingly used. If the crime is a minor one — prostitution is a fine example — a sense of balance compels us to recognize that its insignificance on the scale of public danger involved is such that we should not stop persons merely because we suspect that they may be engaged in it. And heeding this advice, and not utilizing stop and frisk for minor crimes, is likely to curtail its use for harassment.

Because stopping on suspicion only may well involve interfering with innocent citizens, it seemed to us to be appropriate to curtail severely the amount of force officers might use. We specified that they were not to use those implements that — as police — they are authorized to carry: their weapons and nightsticks.

As human conduct is beyond charting, as people can act in ten thousand different ways, we could not catalogue all the conduct that

would justify stopping and separately that conduct that would not. At best we could stress that "reasonable suspicion" did not mean merely that the particular officer in the field found his suspicions aroused, but that he was to have in mind whether the sound suspicions of any properly alert enforcement officer would have been similarly aroused. And, in an effort to reduce this to somewhat more concrete form, we suggested that factors to be considered were to include the suspect's demeanor, his gait and manner, the officer's knowledge of his background if any, what he was carrying if anything, whether his clothing revealed strange bulges, the time of the day or night the conduct was observed, whether any conversations were overheard, the streets and areas in which the conduct was noted, whether any information had been received from third persons and what was known about them, whether the suspect was alone or in the presence of others who were also suspect, and whether known criminal conduct had taken place in the immediate vicinity.

Our guidelines suggested not only when an officer might stop on suspicion, but how he was to act. If not in full uniform, he was promptly to identify himself, both orally and by showing his shield. The stopping right was not to be misused as a right to cart suspects to the stationhouse or elsewhere; such questioning as was appropriate was to proceed in the immediate area in which the stopping took place. ("Immediate area" was advisedly specified; should the danger of crowd formation, or rock throwing, etc. exist, a suspect might be promptly questioned in a nearby hallway, in a waiting police car, etc.) Once again, the rights of a person merely suspected — quite possibly a law-abiding citizen — were to suffer only *minimal* interference.

We advised, in our guidelines, that persons stopped could not be compelled to answer the questions our statute authorized us to put to them, inquiries as to the suspect's name, address, and explanations of his actions. Here — quite possibly — we were too conservative. But with growing scope being accorded Fifth Amendment rights, it seemed to us that the discreet course was that of discouraging police from using a suspect's alleged failure to identify himself as an excuse for carting him off to the lock-up. As our statute expressly authorizes limited questioning of suspects, and as giving one's name and address and even showing identification to prove it is hardly a hardship, sanctions might have been in order, and it may be that this guideline was unduly restrained.

The extent of the search — the frisk — that might accompany any stopping, was an area in which we recognized the potential for police abuse. Narcotic addicts are hopeless repeaters; gamblers and those who service them also come back with a regularity compelled by their quite different addictions. We anticipated that some police would improperly seek to rely upon purported stop and frisk authority to hunt for contraband on the persons of addicts, numbers runners, collectors, etc.; and that

they would do this having no basis whatsoever for stopping them, but doing so — and searching — only because the purported "suspects" were known through earlier troubles to be addicts, runners or the like. And so, both in our statute and in our guidelines, we specified that the search permitted was to be solely for the officer's protection against hidden weapons. It was not to be a routine part of every stopping. And it was not to be used as a pretext for obtaining evidence.

But guidelines are not self-enforcing, and the use of the frisk is an area that needs careful police supervision. The policeman assigned to a gambling detail who repeatedly reports finding betting slips, and claims to have found them while frisking for weapons for his own protection, is obviously perverting — and endangering — the right to stop and to frisk.

Our statute spelled out no set time limit on the detention of suspects who might be stopped. Such "detention" as it authorizes is only to last long enough to ask those limited questions — concerning identity, home address, and an explanation of one's actions — that the statute expressly sanctions.

I know that some of you — like many New York police officers — may question the need to curtail police powers to stop on suspicion in the fashions that our New York guidelines suggest. Some of you may prefer to take all your law from the courts, and to assume police powers are unbridled until particular judicial decisions come down that impose limitations upon your action. But in suggesting guidelines along the lines of those promulgated in New York in 1964 — in suggesting self-imposed restraints — I am mindful of recent judicial history. Who today can doubt but that we might never have had a *Mapp* case[22] had it not been for police-prosecution conduct in both acting lawlessly and in utilizing the fruits of lawless action until the Supreme Court finally, in June 1961, said it had had enough and promulgated the broad exclusionary rule? Who today can doubt but that we might never have had an *Escobedo*[23] or a *Miranda* decision had the cases involving improper police interrogation not been recurring so regularly that the Supreme Court finally, in 1964 and 1966, said "enough," and markedly curtailed the right of police to question?

More than a century ago the wiley Talleyrand, describing the once great French Bourbon dynasty, observed that, "They have learned nothing and forgotten nothing." Police and prosecutors, should now possess the wisdom to have forgotten "the good old days," and should possess the foresight to have learned that mild self-limitations may tend to offset far more restrictive court imposed sanctions.

I commend the New York guidelines for your serious consideration.

[22] Mapp v. Ohio, 367 U.S. 343 (1961).
[23] Escobedo v. Illinois, 378 U.S. 478 (1964).

Questions and Answers

Richard H. Kuh

QUESTION: What is the difference between Michigan's concept of "reasonable cause to believe that a crime has been committed," and New York's "reasonable suspicion"?

ANSWER: These two phrases seem to me to be the same in meaning. My criticism would be that, putting aside what the Michigan courts have done, the words "reasonable cause to believe that a crime has been committed," is a lot more strongly worded than "reasonable suspicion." "Reasonable cause to believe a crime has been committed" indicates that an act has been committed, and "belief" by dictionary definition is something far more than a suspicion.

Apparently the Michigan courts have merely played around with semantics. The Michigan courts have said that you cannot act on suspicion but they have gone ahead and found circumstances under which there is only reasonable suspicion and stated that this amounts to reasonable belief. I think the words have become synonomous. However, to answer the question in a word I would agree that the Michigan concept of "reasonable cause to believe" is the same as what I consider the common sense concept of "reasonable suspicion" as adopted by statute in New York.

QUESTION: This is a hypothetical question: A person is seen loitering in a dark alley with a package, at 3:00 a.m., he is questioned by an officer, and refuses to give his name or any other information. This refusal is done in a polite manner and other than his whereabouts at the scene of the activity prior to his stoppage there are no other causes for suspicion. What action could be taken at this point?

ANSWER: I would say that I do not know, and I am afraid none of our courts really know, what constitutes loitering. Possibly loitering is being present in a fashion that because of habit and tradition causes some police to want to talk to you. I have seen people stopped in my city, when they were walking along, and charged with loitering. I have seen some of our best citizens stand on street corners and not be charged with loitering. I am not sure what loitering is other than a conclusion rather than a description of an act.

Assuming that a suspect is either standing or walking in a dark alley with a package and nothing more I would say that the policeman is obligated to observe him for a bit more time. I do not think you have enough reason to suspect someone because of the mere presence of a package in what a policeman deems a dark alley. I do not think it is enough to arouse suspicion under reasonable conditions nor to permit a stop on suspicion.

If the suspect has been stopped and says, "I would not tell you my name, my address or anything," I still do not think the officer has enough facts to constitute reasonable cause to believe and to make an arrest. If the officer did stop a person under those circumstances, it would be my judgment that he acted prematurely. I do not know that if he watched a bit longer there would be something to count on or not. However, if the officer followed that person for some yards or a city block and the suspect became aware of the fact that he was being followed and started to run, then I think you would have reasonable suspicion. The suspect who, seen in an alley, carrying a package, is followed by an officer who says nothing, glances over his shoulder and sees the officer following him, then quickens his pace and starts to run, certainly creates a situation of reasonable suspicion.

QUESTION: What is your opinion in the case of an officer using deception, trickery, or subterfuge in field interrogation; for example, by asking a person if he has heard a scream, etc. and thereupon initiating a conversation?

ANSWER: I would determine that one is allowed under our statute some simple interrogation to determine the name, identity, and purpose of the suspect. It would seem to me not repugnant to any concept of fairness if one seeks to learn the suspect's name, identity, or what he is doing, by some indirect method. I do not think coercion is in order. Saying to the suspect, "Did you hear a scream?" in hopes that his answer may be indicative as to whether he heard it, whether an act took place, whether he had a hand in it, does not shock me. I think we do know that there are many judges who find anything other than an officer coming in and proclaiming that in every way he is an officer and asking direct questions, is deception and police officers should not practice deception. Possibly these judges would eliminate detectives who operate extensively not as policemen, which is absurd. I think we must have the ability to use deception providing it is not coupled with force. If a few simple questions could be asked in the field I would argue that they are appropriate. Yet, what the courts will hold depends on the judges who are sitting in those courts.

QUESTION: A subject is stopped in a motor vehicle for reasonable suspicion and answers the scrutiny questions satisfactorily. Would the stopping for reasonable suspicion authorize a search of the vehicle and to what extent?

ANSWER: I would state that after the suspect gives reasonable answers to the officer's questions the officer still has only suspicion and no reason to believe a crime has been or is being committed.

If this is the case the officer has the basis for neither an arrest nor a search incident to that arrest. The officer's only basis for a search would

be to protect himself; having stopped the suspect, he might frisk him and then see through the car window as to whether there was a gun, knife, etc. at hand. If the officer finds none of these objects he has no right to use the stopping on suspicion act as justification for a detailed search. The officer cannot conduct a detailed search until and unless, accurately worded, he really has a basis for the belief of a crime and makes an arrest; then the search is incident to that arrest.

QUESTION: How does the Secret Service justify their illegal stop and frisk practice when the President is in the immediate area? As we understand it they can stop anyone carrying a rectangularly shaped package.

ANSWER: In this situation there is simply the cooperation and toleration by the American public. Security has said that when the President or a distinguished foreign visitor is involved any object being carried has the potential of being a bomb, gun, etc., and therefore we want to have it investigated. Assuredly this conduct is straining both the concepts of "reasonable cause to believe" and also "suspicions." However, under all the circumstances, and with the experience of assassinations in the background, I think it makes sense. As most people in America would permit frisking to be practiced, I think this is another argument for saying to the courts that they must openly recognize that the police must under certain circumstances be able to act on less than probable cause.

QUESTION: Would you say that the term reasonable suspicion in the context of this discussion is considered in terms of a reasonable man or a reasonable police officer?

ANSWER: A reasonable police officer is used as the measuring stick since he has special training. I think, however, that a reasonable police officer must be ready and able to articulate what his special training is and what it was that meant something to him.

QUESTION: A police officer is on routine patrol in his district. This is a business area with no stores open after 9:00 p.m. The officer observes a panel truck in the area behind an appliance store, and he sees one subject get into the truck but no one is at the rear of the truck. The officer from his own knowledge of the beat knows that no clean-up men or other persons are ever in the area at this time, approximately 4:00 a.m. Additionally he notices several boxes in the rear covered by a blanket.

Operating on the premise that the officer has only suspicion at this point, is he limited only to questioning the occupants or the subjects or can his suspicion justify a search of the truck?

ANSWER: Under our statute in New York, narrowly and carefully construed, the officer is not permitted to search the truck on his suspicion.

Let me digress for a moment. We passed this statute in New York because we knew that many of our judges narrowly interpreted police

rights. You have an arrest provision that permits an arrest on reasonable cause to believe a crime has been committed, yet nothing in the statute permitting action on reasonable suspicion and hence many of our trial judges would throw cases out of court. It was felt that there was some common law experienced but we knew many judges were conservative and would not recognize this. We were forced to face political realities and resistance. Michigan had a stop and frisk statute killed in the legislature, and for these reasons we deliberately phrased our own statute very narrowly.

I think it would not be out of order either under the common law or by statute to provide that when someone is in a motor vehicle, under suspicious circumstances, when an object which is a part of that suspicion is showing, that it would be reasonable to permit lifting the cover to get some idea of what is there.

This is not authorized expressly by the New York statute; however, I think common sense gives a clear answer. What a judge would do, I do not know. Hopefully he would go to some common law authority and say that the added intrusion of simply moving a blanket after having stopped the subjects is so minor that under all the circumstances it is not unreasonable.

THE CIVIL LIABILITY OF THE POLICE OFFICER

by Horace W. Gilmore*

It is a real pleasure for me to participate in this tele-lecture series and have the opportunity to discuss the civil liability of the police officer.

Surprisingly enough, very little has been written on this question, and in covering this area in this series of lectures, Michigan State University is rendering a great service to the police officers of Michigan.

Before commencing a discussion of the specific subject, I think it is well that we review some of the highlights of the authority of police officers on the street in the performance of their duties. It is necessary that these be alluded to briefly so that the general authority of the police officer can be understood. With this background we can then move into the liability of the police officer both under state law and under the Federal Civil Rights Act.

First, we must look at the power of the police officer to arrest both with and without a warrant. A valid arrest may be carried out either with or without a warrant. If a warrant is properly issued, the arrest is valid and the police officer need not fear civil liability. We will not discuss here the requirements for the issuance of a valid warrant because that has been covered in previous lectures.

But, of course, an officer need not have a warrant to arrest, if the other proper bases for arrest exist. A police officer may always arrest for a felony or misdemeanor actually committed in his presence. He may also arrest if he has reasonable ground to believe the person arrested is the perpetrator of a felony. Additionally, he may arrest on reasonable grounds to believe that a felony has been committed, and that the person taken into custody has committed it. This means, of course, that the arrest may be valid even though it ultimately turns out that no felony has actually been committed by anyone.[1]

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1 CL 1948-764.15; MSA 28.874; George, *Constitutional Limitations on Evidence in Criminal Cases*, page 12 (ICLE 1966).

It should be pointed out, however, that the officer must be correct in his knowledge of the law. If he believes something is a crime when it is not, or that something is a felony when it only is a misdemeanor, his mistaken belief does not legitimate the arrest.[2]

With reference to the force necessary to effect an arrest, a police officer may use the reasonable force necessary to make a valid arrest, and if the arrest is for a felony, the police officer may use reasonable force and apprehend a felon who attempts to flee. The law further provides that if it is necessary to use deadly force to detain a fleeing felon, deadly force may be used.[3] On the other hand, deadly force may not be used to capture a fleeing misdemeanant.

In the area of search and seizure, another area in which problems of civil liability may arise, a police officer may search and seize property pursuant to warrant or, under certain conditions, pursuant to lawful arrest.

We will not discuss the requirements for the issuance of a valid search warrant. That has been discussed in a previous lecture. If the warrant is a valid warrant, the officer, without fear of civil liability, may search pursuant to the warrant, providing the warrant is followed precisely, and the goods specified in the warrant are the goods seized. The officer with a warrant generally may not go beyond the warrant in making a search or seizure.

Police officers pursuant to a valid arrest may make a lawful search of the person of the arrestee provided there is immediate danger of concealed weapons or destruction of evidence. The fundamental requirements for a valid search without a warrant is that there be a valid arrest and the search be a reasonable one within the terms of the arrest. Special problems arise in searching vehicles pursuant to arrest for traffic violations, but these will not be discussed because they too have been previously covered.

Assuming a valid arrest for a felony, search may then cover not only the person of the defendant, but his immediate surroundings. If the arrest is made in a room within a building, that room may be searched.[4] As we saw earlier, a valid arrest may be based upon a reasonable belief that a felony has been committed. Information from a reliable informant can give an officer reasonable grounds to arrest.[5] In addition, information from police sources including those in other states is adequate to give a reasonable ground for belief that a felony has been committed.[6] It should be remembered, however, that a search without a warrant is never justified by what the search turns up.

[2] George, *op. cit.*, page 13.
[3] Perkins, *Criminal Law* 869-878 (1957); People v. Gonsler, 251 Mich. 443 (1930); People v. Burt, 51 Mich. 199 (1883).
[4] United States v. Rabinowitz, 339 U.S. 56 (1950).
[5] McCray v. Ill., 386 U.S. 300 (1967).
[6] State v. Peterson, 424 P 2d 810 Ariz. (1967).

Some problems of civil liability of police officers may arise pursuant to interrogation, and it is important that police officers know the general rules of interrogation to protect themselves from the possibility of civil liability either under state law or under the Federal Civil Rights Statute.[7]

Previous lectures in this series have detailed limits on interrogation, but a few things need to be emphasized as the result of the *Miranda* decision.[8] It is clear that civil tort liability under the Federal Civil Rights Statute and also possibly under state law can arise as the result of improper interrogation. Therefore, the police officer must remember that once a person is taken into custody or has been substantially deprived of his freedom of action, all of the *Miranda* rights arise. If interrogation proceeds contrary to the standards of *Miranda,* there is always a possibility of civil tort liability.

The more common cases in which civil tort liability of the police officer may arise in interrogation are those where physical violence or psychological coercion is used upon the defendant. These will be discussed in more detail later in the lecture.

One other area of the law needs to be mentioned. Michigan law requires that anyone arrested must be taken without unnecessary delay to the nearest magistrate for arraignment.[9] No precise definition of "without unnecessary delay" has been furnished by the courts and once again no detail will be spelled out here because it is covered in another lecture. However, the police officer should remember that he might be subjected to civil liability, particularly under the Federal Civil Rights Statute, if he unlawfully detains a prisoner and does not promptly produce him for arraignment.

With these general principles in mind, we now turn to a consideration of the civil liability of the police officer. We will consider first the common law tort liability of policemen for torts growing out of their law enforcement activity. After we have looked at tort liability we will look at liability under the Federal Civil Rights Statute. Finally, then, we will consider some practical questions covering the protection of police officers in these areas.

The general law of most states in the United States, including Michigan, makes individual police officers personally liable for torts growing out of their law enforcement activity. Torts, of course, are defined as civil wrongs compensable by the payment of damages. Liability has been found throughout the United States, and damages assessed against individual police officers, for false arrest, assault and battery, false imprisonment, negligent operation of police vehicles, assault during arrest, and

[7] 42 U.S. C.A. 1983.
[8] Miranda v. Arizona, 384 U.S. 436 (1966).
[9] MSA 28.871 (1).

improper injury and death to persons not in police custody fleeing from attempted arrest.

The liability of the police officers individually for torts growing out of their law enforcement activities can generally be stated to be as broad as the liability of the general public for torts committed by them. This includes both intentional and negligent acts.

The general tort liability of a police officer in the performance of his duties rests upon the proposition that a police officer acting without valid authority is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[10] Suits based upon acts outside an officer's authority are deemed to be against the officer in his personal capacity and not in his official capacity. As pointed out earlier, this includes negligent as well as intentional acts. For example, when a police car is driven negligently, and injury results from an automobile accident, the officer may be liable.[11]

First, we will consider suits for *false arrest*, for these are probably the most common types of tort cases brought against police officers. We start with the fundamental proposition that if the police officer arrests with a warrant that has been validly issued, there is no civil tort liability. He is protected by the warrant and can freely serve the warrant and effect the arrest unless there is a defect so glaring in the warrant that it would be apparent to the officer upon reading. I emphasize here I am merely talking about arrest, and not injury or death of a suspect fleeing arrest. These will be discussed in a separate section. I assume in this discussion of false arrest that there is no resistance, or any need for the use of force to detain the arrested person.

In cases of arrest without warrant, police officers may be held liable for false arrest suits unless the arrest is a legal arrest as defined earlier in the paper, that is unless the person has committed a felony or misdemeanor in the presence of the officer, or unless the officer has reasonable grounds to believe that a felony has been committed and reasonable grounds to believe that the person arrested committed the felony.[12] It should be noted here that the burden is upon the police officer to show that he had reasonable grounds once the complainant has shown he was arrested without a warrant. Reasonable grounds, of course, means, at least, that "a man of ordinary care and prudence knowing what the officer knows would be led to believe or conscientiously entertain a strong suspicion that the arrested person is guilty of a crime, even if there is room for doubt."[13]

[10] *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, Mathes and Jones, 53 *Georgetown Law Journal* 889, 895; *Ex Parte Young*, 209 U.S. 123, 160 (1908).

[11] 83 ALR 2d 383.

[12] *Restatement of Torts*, Sec. 121 (1934); Mathes and Jones, *op. cit.*, page 897.

[13] Cole v. Johnson, 197 Cal. App. 2d 788, 793 (1961); Mathes and Jones, *op. cit.*, page 897.

All of this means simply that at the present time the officer making an arrest without a warrant must meet the standards of the arrest law set out above. The reasonable belief required is the reasonable belief of a reasonably prudent police officer under same and similar circumstances. The law does not hold the police officer to an absolute strict liability standard, and it tests his actions by the actions of a reasonable police officer under same and similar circumstances. Therefore, if the police officer follows the standards of the law on arrest without warrant he is reasonably insulated from tort action. If, however, he oversteps the reasonable man standard, he may subject himself to civil liability.

Actions for false arrest usually also involve damage claims for the ensuing false imprisonment.[14] In these cases the liability for false imprisonment follows and must be dependent upon the false arrest, and if the arrest is valid there cannot be liability for such false imprisonment. However, there are a few cases where, even after a valid arrest, the police officer may nevertheless be subject to tort liability for false imprisonment if he failed in his statutory duty to take the arrested person before a magistrate without delay.

Two California cases[15] have so specifically held. Clearly then, it is the duty of the police officer, once he has affected a valid arrest, to see that the prisoner is promptly taken before a magistrate in compliance with law. Delay in so doing might subject him to a civil damage suit, particularly if the delay is an unwarranted one, or one of unusual length.

All that has been said with reference to liability for false arrest is equally applicable to liability for damages for improper and illegal searches and seizures. If the police officer searches and seizes with a warrant he is probably insulated from civil liability, providing the warrant is not totally invalid on its face. If, however, the search and seizure is pursuant to an arrest, the officer must take care that the arrest is legal, and that the search is a proper search pursuant to such arrest. It should be noted, however, that the measure of damages for illegal search and seizure will probably be relatively small, and not many such cases arise. Nonetheless, the police officer does subject himself to civil liability if his search is the result of an illegal arrest or if the search is one beyond the search authorized by the arrest made. For self-protection it is incumbent that police officers making searches remain within the legal limits of the search.

Another way in which a police officer may be subjected to tort liability is through the use of excess force in effecting an arrest, even though the arrest is a legal arrest.

The basic rule is that a person being arrested may be subjected to no more force than is reasonably necessary to effect the arrest. If the de-

[14] Mathes and Jones, *op. cit.*, page 898.
[15] Dragna v. White, 45 Cal. 2d 459, 289 P. 2d 428; Gorlack v. Ferrari, 184 Cal. 2d 702 (1960).

fendant resists or takes flight the officer may use all force reasonably necessary to make the arrest. The use of force is greatly limited, however, in arresting for misdemeanors.[16] Here, deadly physical force is never justified.

Let us consider, first, the force that can be used if the arrestee resists or takes flight after arrest for commission of a felony. The general rule is that an officer making a lawful arrest for a felony may wound or kill a resisting or fleeing suspect where he cannot otherwise complete the arrest. The general rule applies to all felonies although many authorities have urged that it should be restricted only to "major felonies."[17] It is clear here also that the person shot need not actually be the felon. The test is not whether he is the felon or not, but whether the arrest was lawful under the rules set forth above, and whether the force was reasonably necessary to apprehend the defendant. This is true in Michigan although other courts have held that the reasonable belief doctrine is not applicable and that the arrestee must actually be the felon. I think it is safe, however, to say in Michigan that the test is the validity of the arrest, and the necessity for the use of the force.

This means in effect that the police officer may use reasonable force to affect the legitimate arrest of a fleeing felon, including the use of deadly force. The test once more is whether the force was reasonably necessary to accomplish the officer's purpose, and he will be judged as a reasonable police officer under the same and similar circumstances.

It should be pointed out also that the police officer will be liable in civil damages for any injuries suffered by the fleeing felon and by innocent by-standers, if the force he uses in effecting the arrest is more than is reasonably necessary under the circumstances then and there existing.

Once more we see, as we do throughout most of the tort area, that the standard to be applied is the standard of the reasonably prudent police officer operating within the law covering arrest, search and seizure, and the rest. It is, of course, clear that a police officer may always use deadly force in affecting the apprehension of a fleeing person where it is necessary in self-defense. If the officer is in danger of life or limb to himself he may always use that force necessary to defend himself and this, of course, is true, whether the offense is a misdemeanor or a felony, for the simple reason that an officer has the same right to defend himself against attack as does any other citizen.

With reference to arrest for misdemeanor the law is different. Deadly physical force may not be used to stop the flight of a fleeing misdemeanant. The officer may not even seriously wound or otherwise harm a fleeing misdemeanant unless it is necessary to protect himself. So generally stated

[16] 28 *University of Cincinnati Law Review*, page 488, et. seq. and 21 *University of Pittsburgh Law Review*, 123 et. seq.

[17] Mooreland, *The Use of Force in Effecting or Resisting Arrest*, 33 *Neb. Law Review*, 408 (1954).

an officer will be civilly liable for wounding or killing a fleeing misdemeanant except where the misdemeanant resists to the point of endangering the life of the officer or inflicting great bodily harm upon him. In the latter case the officer, of course, can protect himself, as can any citizen.

The rigidity of these common law standards has been severely criticized.[18]

Police officers who have prisoners in their custody can also be civilly liable for negligent failure to provide proper care for them, including medical care.[19] They can be liable for negligently failing to adequately supervise jailed prisoners,[20] and they can be liable for the negligent operation of official motor vehicles while in the performance of their official duties.[21] When the law here speaks of negligence, again, it uses the reasonable man standard; that is, what would a reasonably prudent police officer do under same and similar circumstances?

It is thus seen that the police officer in all of his actions, in arrest, search and seizure, interrogation, the maintenance of prisoners, and the like, has a duty to comply with the law that regulates these various activities. To the extent that he varies from the law and fails to adhere to a reasonable police officer's standard he subjects himself to personal civil tort liability.

The law holding police officers individually liable for torts committed in the performance of duty, when they are not willful and intentional violations of the law, has been greatly criticized and is a matter that should be given close attention by the Legislature so that there can be greater protection for the sincere police officer. This will be discussed later in the lecture.

We now turn to a consideration of the civil liability of the police officer under the Federal Civil Rights Act. Two sections are applicable. Section 1983[22] creates a federal civil remedy for deprivation of constitutional rights or statutory rights by persons acting "under color of state law." Specifically, the statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons

[18] Mathes and Jones, *op. cit.*, page 898. They say, "It is ironic understatement to say that this situation puts the individual police officer on his mettle, perhaps on mettle he should not be expected to possess. In the split second or so in which he might have an opportunity to effect an arrest, he must at his peril go through a most problematic 'balancing' process to determine 'reasonable cause' for the arrest and the degree of force reasonably necessary. Confronted with such a delicate choice and personal responsibility for its correctness, it would not be surprising if police officers generally decided to err on the side of caution and think of home and family instead of the public interest in law enforcement."

[19] Annotation, 61 ALR 569.

[20] 14 ALR 2d 353.

[21] 83 ALR 2d 383.

[22] 42 U.S. C.A. 1983.

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

The other section is Section 1985.[23] It establishes a federal cause of action against a conspiracy to deprive any person of the equal protection of the laws, or of any privileges and immunities under the laws. In the latter section the "color of state law" requirement is omitted from the language of the Act, but the Courts seem to have read it in.[24]

The section that has been used most against police officers is Section 1983. What does this mean with reference to the civil liability of the police officers?

It means that not only may the police officer be liable in the state courts for torts of the kind we have discussed above, but he may also be liable if, while acting under color of state law, (that is, in his official capacity as a policeman), he deprives any citizen of the United States or other person of any of his rights, privileges or immunities secured by the Constitution and laws. In view of the fact the United States Supreme Court has read all of the basic protections of the Federal Bill of Rights into state criminal procedures, this means that in most of the cases we have listed above, a police officer may be civilly liable not only in state courts, but in the federal courts as well under a separate civil rights suit.

Some of the types of actions available under Section 1983 include actions for damages for illegal search and seizure, illegal arrest, imprisonment without hearing, coerced confession, invasions of privacy, physical abuse resulting in death, illegality surrounding arrest, and others. Thus, it is seen that the coverage here is nearly as broad as the coverage under the state law. For example, a jury in Chicago, not too long ago, rendered a verdict of $15,000 under the Federal Civil Rights Act, against police officers in the case of an unlawful arrest and detention for six days,[25] and in Texas a jury gave a verdict of $5,000 under the Federal Civil Rights Act against police officers for illegal search, arrest and detention.[26]

The leading recent case in the United States Supreme Court interpreting Section 1983 is *Monroe* v. *Pape*.[27] Here 13 policemen broke in and ransacked the home of one Monroe without a warrant for arrest or a warrant for search. Monroe was taken to the police station and detained for 10 hours without the specification of any charges. Suit was brought under the Federal Civil Rights Act. Several things became clear from this case on actions against police officers under the Federal Civil Rights Act.

[23] 42 U.S. C.A. 1985.
[24] Kochs v. Suieback, 194 Fed. Supp. 651, 657; Collins v. Hartiman, 341 U.S. 651, 660; Byrd v. Sexton, 277 Fed 2d 418, 423 (8th Circuit).
[25] Wakat v. Harlib, 253 F 2d 59.
[26] Jackson v. Duke, 259 F 2d 3.
[27] 365 U.S. 167 (1961).

First, to maintain a cause of actions for damages under this section, it is not necessary to allege or prove a specific intent to deprive a person of his civil rights, nor is it necessary to prove purposeful discrimination. Second, the meaning of "under color of state law" became clear. In *Monroe* v. *Pape* the Court held that "under color of state law" means misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. A police officer who makes an illegal arrest or an illegal search is acting under state law even though his action is prohibited or even made criminal by the state law. Therefore he is subject to liability under the Federal Civil Rights Act.

Another legal question under Section 1983 relates to the question of what are federally protected rights, as distinguished from state protected rights. A summary of the recent cases on this matter show that the following types of actions by police officers violate "federally protected rights" under the statute: (1) illegal arrest, (2) illegal searches and seizures, (3) extracting confessions from an accused by coercive means, (4) inflicting summary punishment or unnecessary violence upon an accused, (5) holding an accused incommunicado and refusing to allow him to consult with counsel, (6) subjecting a prisoner awaiting trial to involuntary servitude by requiring him to perform hard labor, (7) refusing to allow a group claiming to be a religious sect, the Black Muslims, to practice their religion in prison, and (8) interference with the right of assembly.[28]

In summary, it can be said that the rights protected under the Federal Civil Rights Statute include those deprivations which violate due process, offend the sense of justice, or shock the conscience. Thus, police officers are now generally held liable under the Federal Civil Rights Act for torts committed in their official capacities and involving deprivations of federally protected rights.[29]

Under Section 1985 of the Civil Rights Act, police officers can also be liable. The essential elements of a cause of action here have been declared to be: (1) that the defendants conspired, (2) that the purpose of the conspiracy was to impede the due course of justice, (3) that there was a purposeful intent to deny a citizen of the equal protection of the laws, (4) that the acts complained of were done under color of state law or authority and (5) that by the acts done in furtherance of the conspiracy, the plaintiff was injured in his person or property or was deprived of having and exercising a right or privilege of a citizen of the United States.[30]

[28] Summary by Arnold S. Trebach of the U.S. Civil Rights Commission citing the following cases: Refoul v. Ellis, 74 F Supp. 336; Cohen v. Cahill, 81 F 2d 879; Geach v. Moynahan, 206 F 2d 714; Davis v. Turner, 197 F 2d 847; Wakat v. Harlib, 253 F 2d 59; McCollum v. Mayfield, 130 F Supp. 112; Sewell v. Pegelow, 291 F 2d 196; Pierce v. La Vallee, 293 F 2d 833; Sellars v. Johnson, 163 F 2d 877.

[29] Mathes and Jones, *op. cit.*

[30] Hoffman v. Halden, 268 F 2d 280, 292.

Thus, the picture for the police officer is not a bright one in terms of individual liability. Not only is he liable under state law for common law torts; he can also be held liable under the Federal Civil Rights Statutes for basically the same violations. This means that he can be subjected to double liability.

Of course, it is claimed that such liability will not attach to police officers unless they themselves violate the law, or do not act as reasonably prudent police officers under the circumstances then and there existing. On the other hand, it is well known that often juries will hold police officers to a standard generally higher than they will hold average citizens, for the simple reason that they are police officers and are endowed with so much additional authority.

With all of this in mind, and with an awareness of the serious possibilities of disastrous law suits against police officers acting in the performance of their public duties, what can be done and what should be done to offer them more. Two distinguished authors, Federal Judge William C. Mathes and Assistant United States Attorney Robert T. Jones, feel very strongly that there is a need for reversal of the present system of individual financial liability for police officers and immunity for governmental agencies. They say in an article in the *Georgetown Law Journal*:[31]

> What is needed, in short, is a reversal of the present system of individual financial liability for police officers and of immunity for the governmental entities of which the police are agencies. And while it is probably not appropriate for courts, particularly Federal Courts, to overturn traditional rules of governmental-entity immunity, the historical fact that the doctrines of judicial-legislative-executive immunity have developed in the courts against 'the common law background of tort liability' cannot be disclaimed; and it is but a short step to extend their protection to the individual police officer . . .
>
> It cannot be gainsaid that hard cases do tend to make bad law; this is particularly true in cases of 'police brutality' . . . Yet those who find the immunity doctrine harsh must remember that the alternatives are not 'punishment' or 'no punishment' of the individual police officer, for the criminal law will still stand to punish as excessive abuse of authority. Rather, the alternatives here are between imposing personal financial (tort) liability to the constant dread of the individual police officer, and shifting that financial responsibility to the police agency he serves. Law enforcement is bound to suffer more than we can afford when the never-overpaid police officer, assigned to risk his very life in the task of, say, ferreting out suspected criminals in a dark alley at three o'clock on a rainy winter morning, must stake the security of his family upon a snap determination as to whether some judge or jury, in the ivory-tower quiet of court or jury room, will find that he used more or greater force than was reasonably necessary under the circumstances . . .

In brief, the thesis of these distinguished authors and my thesis is that the immunity of state and municipal government from civil liability

[31] Mathes and Jones, *op. cit.*

for police officers' torts is wrong. At the present time there is no authority or requirement in Michigan law that the states or the municipalities reimburse police officers for torts committed in the course of their employment. It appears to me that such a law should be enacted and that police officers should be entitled to reimbursement for their torts, in the absence of a showing of a willful, deliberate, intentional violation of the law by the individual officer. Everyone of us as a driver insures ourselves against negligent acts that we commit on the highway. The police officer in performing his duty is acting on behalf of all of us. He is unable personally to bear the burden of expensive litigation. It is submitted that the state must assume the responsibility for reasonable mistakes in judgment made by the police officer in the performance of his official duties.

Questions and Answers

Horace W. Gilmore

QUESTION: In a civil suit, who is to decide if a police officer acted prudently or responsibly under a certain set of circumstances? Should this decision be left to an untrained juror or would a board of police officers be in a better position to judge?

ANSWER: If a civil suit is brought against an officer the determination of a reasonable standard is going to be left to the judge, sitting without a jury; or to the jury under the instructions of the court. This occurs because it is a civil suit brought as a tort action in the circuit court.

To repeat the point I made in my lecture, it appears that the state should assume the responsibility for reimbursement of individual police officers in most of these cases. I do not think the state should be responsible for reimbursement of police officers who are totally out of line. A state statute should be enacted allowing for reimbursement of police officers for their civil torts after judgment is entered, after a hearing before a board of police officers. Once the judgment has been entered, the individual officer, if he wants to be reimbursed by the state, should be able to apply to the state for reimbursement from the available funds.

Judge Mathis makes the point that it is wrong for the State not to reimburse police officers for their reasonable mistakes in judgment. It would appear that if some type of fund were set up by the state legislature providing for the establishment of a police board to review these judgments and reimburse police officers for reasonable mistakes in judgment, it would mean a better community and a more efficient law enforcement environment.

QUESTION: Would you discuss further "reasonable cause to believe a crime has been committed" in the light of the recent enactment of stop and frisk laws?

ANSWER: I was not aware that any state level statute had been enacted in Michigan. However it is in the legislature now and I believe Dearborn has a comparable ordinance.

How might these stop and frisk laws protect Michigan police against tort action? This is a good question and a difficult one to answer.

Stop and frisk laws usually are based upon the proposition of reasonable suspicion whereas the present law is based upon reasonable cause to believe. Occasionally the line becomes quite thin between the definitions of "suspicion" and "reasonable cause." The question is, are they really different? I realize that "suspicion" is a bit less positive than "reasonable cause."

Significantly, the New York stop and frisk law, based upon "reasonable suspicion," is presently before the United States Supreme Court. Before this term of court expires we will learn whether or not stop and frisk laws are constitutional. Sometimes in these areas we are dealing with semantics and it becomes difficult to draw the necessary line between "reasonable cause to believe" and "reasonable suspicion." However, my advice to any officer is that when and if the situation takes you into court, testify in terms of reasonable cause to believe.

QUESTION: To the best of your knowledge have any officers been held financially liable for injury or death to an innocent citizen resulting from an auto chase in which the officer was pursuing a known felon?

ANSWER: While I cannot name a specific case, there have been liability cases wherein a chase was pursuant to an improper arrest and an innocent person was injured. The test here would be whether the officer is exercising reasonable force, whether he had reasonable grounds to believe that the person had committed a felony, and whether what he did was reasonably necessary to apprehend him. If the officer is within these reasonable limits and a citizen then gets injured I think he is insulated from liability. The question is, whether this force was reasonably necessary to effect the arrest.

QUESTION: If a known felon is fleeing in an automobile and the officer has been able to get a license number of the vehicle, may deadly force still be used in effecting the arrest? Furthermore, if it is known that the vehicle is stolen would this have any additional bearing on the case?

ANSWER: I assume your question relates to the question of whether you must use deadly physical force to effect an arrest, or whether you can radio the license number and the car's route so that other officers might attempt the arrest.

It is hard to answer a specific case without knowing all the facts. Although you have the license number it may be necessary to continue to pursue the vehicle and even use deadly physical force to stop this individual because he is going into an area where you may not be able to get help. On the other hand, if you were, for example, in a metropolitan area where help could be summoned immediately, and where the individual could be reasonably restricted in his activities this would be a different case.

QUESTION: If a police officer in arresting on a misdemeanor finds himself in a position when he must use extreme force to protect himself from harm, would this become a felony and if so could deadly force be used then?

ANSWER: If it is necessary for a police officer to use physical force or deadly physical force to protect his life or person it does not matter

whether it is a felony or misdemeanor. The police officer, when in the position of protecting himself, can always use the force necessary to protect life and limb.

QUESTION: A police officer does not use all the force necessary to make an arrest, and the felon escapes. If the escaping felon injures an innocent bystander, could the officer be held liable for the injuries committed by the felon?

ANSWER: If I were a police officer I would use as much force as was necessary in that situation to effect the arrest. However, I cannot answer your question as to whether he would be liable in a tort case, since I have never seen a case like that.

QUESTION: What do you think of a national or state insurance program for police officers? And, if initiated would this program start a rash of civil suits against police officers and also give the officers a poor public image?

ANSWER: I think police officers deserve protection as long as they act within the limits of their authority and are guilty only of mistakes of judgment.

However there is one way the individual officer can protect himself, by purchasing insurance. Yet, it seems to me that it is the obligation of the state to protect the police officer. If the state could be persuaded to take this position then sufficient laws would be enacted by the legislature. Without this governmental protection and backing, an insurance program would be necessary if merely for self-protection.

I do not think this action will lower the image of the police in the eyes of the public. The police image will be lowered when police officers get out of line and begin to overstep the bounds of their authority.

QUESTION: Does the City of Detroit assume or compensate the police officers if they are found liable for tort action?

ANSWER: I do not know whether there is a specific ordinance in effect *now* to protect officers; however, the city did take this action for some time. It is my impression though that the city has discontinued this practice.

QUESTION: In view of the *Williams* v. *City of Detroit* decision does the municipal corporation enjoy immunity from liability from the tort action of police officers?

ANSWER: The municipal corporation does enjoy immunity now due to an amendment to the statute that came down after *Williams* v. *City of Detroit*. The city as well as the state enjoy this immunity; however, the city can waive that immunity by ordinance if it wishes to do so.

QUESTION: Does a citizen have the right to use physical force in resisting arrest, if he considers that arrest illegal?

ANSWER: Under the proposed revision of the criminal code a citizen clearly would not have this right. However this is not the law now. Currently the citizen has this right but he acts on his own peril in doing so. It is my opinion that the law should require the citizen to submit to the arrest and pursue his civil remedies as he feels he should.

QUESTION: What degree of force can a police officer use in perfecting an arrest under a circuit court warrant or a justice court warrant? Some out-county municipalities receive bench warrants either from the justice or circuit courts and they are given to an officer to execute. However, the officer may have no knowledge as to what was the purpose of the warrant.

ANSWER: If the officer does not know why the warrant was issued I would say that he would have to act rather at his own risk. Many warrants are issued for contempt of court, traffic violations or other offenses where deadly physical force could not be used.

In these instances the first thing the officer, faced with this responsibility, should do is find out why the warrant was issued. If the officer cannot obtain this information I think he should proceed on the assumption that the violation was, or could be, a misdemeanor in which case deadly physical force could not be used.

QUESTION: In addition to using deadly force in his own self-defense, may a police officer use deadly force in the defense of others in the area of the arrest, whether these individuals are police officers or citizens?

ANSWER: Certainly, you can always use deadly physical force in defense of life.

QUESTION: After a legal arrest, will the standard for reasonable delay in arraignment be a matter of absolute proof of the violation of a defendant's right to a speedy arraignment or will it be the proof of a reasonably prudent man acting under the conditions of getting a warrant?

ANSWER: The law in Michigan certainly is not clear on this point. Michigan law says that the defendant shall be taken without unnecessary delay to a magistrate. The practical answer to your question is to have the defendant arraigned as quickly as possible. Unnecessary delay is determined by the particular circumstances then and there existing, however.

QUESTION: What risk does a county sheriff run into by accepting a prisoner, arrested without a warrant, from another police agency? Would the sheriff be obliged to investigate the arrest to determine whether the arrest was valid?

ANSWER: I would assume that if the county sheriff accepts the arrested prisoner, without a warrant, there would be an obligation on the part of the sheriff to see that the man is arraigned. I think the sheriff could protect himself by taking the prisoner to a magistrate "without unnecessary delay." Once the sheriff has the prisoner, he can not merely hold him. If the original police agency did not take any steps to have the defendant arraigned then the sheriff must do so.

In answer to whether the sheriff should investigate to determine whether the arrest was valid, I think by taking the defendant before a magistrate and having the arresting police agency demonstrate its basis for the action, the sheriff would be protected.

QUESTION: Do the municipalities, cities, or the counties enjoy immunities, as they have under state law, protecting them if they are named as the defendant in an action under the Federal Civil Rights Act?

ANSWER: Yes they do, unless there has been some ordinance or state statute passed waiving immunity. Municipalities in a state are in the same position under the Federal Civil Rights Act as they are under the state common law torts.

QUESTION: If a delay in arraignment is caused by the inability of the officer to find an available judge, would the officer then be liable for false imprisonment or false arrest?

ANSWER: No. If the officer has done everything possible and a judge is not available there is nothing else he can do, and the police officer is not liable.

QUESTION: What is the basis for charging a person with a crime in a federal court, after he has been acquitted of the same crime in a state court?

ANSWER: I assume you are speaking of civil rights liability. The answer in this case is that the defendant is not being charged with a crime. A common law tort suit, in a civil court in Michigan, is not a criminal prosecution but a suit for damages. A suit under the Federal Civil Rights Act is not only a criminal act against the defendant but also a suit for monetary damages. Neither one is a criminal proceeding.

QUESTION: Have there not been instances where citizens have been acquitted in the state courts and recharged in a federal court with the charge bearing a criminal penalty?

ANSWER: There are certain acts that can, of course, be criminal violations of the state law and also criminal violations of the federal law. I think you are thinking specifically of some southern cases.

In the *Liuzzo* case the defendant was charged with murder and when he was acquitted in the state court they brought an action under

the Federal Civil Rights Act. This can happen in many instances where one act can be the violation of both state and federal law and, therefore, the defendant can be tried twice.

Sections 1983 and 1985, of which I spoke today, relate only to civil actions. There are other sections of the civil rights law that relate to criminal actions.

Many violations can subject a person to two actions. In the case of bank robbery a person could be prosecuted for a bank robbery under the federal statute, but this does not mean he could not be prosecuted for armed robbery under the Michigan statute.

Double jeopardy would not enter into these situations because double jeopardy applies only when you are in jeopardy for the same crime. Returning to the *Liuzzo* case, for example, the man was in jeopardy for murder in Alabama, and when he was acquitted that totally completed his liability there because of the double jeopardy provision. However, the defendant, in committing the murder, allegedly committed another crime. It was stated that depriving Mrs. Liuzzo of her civil rights was a criminal violation of federal criminal law. These were two separate crimes and double jeopardy only applies to the same crime.

QUESTION: Information is received from a reliable informer that there is going to be a narcotics party at a certain home on a specific night. The officer stakes out the house and notices eleven subjects going into the house, all of which are under 21.

Before the raid was carried out, the officers, by looking through a window of the house, notice that while no narcotics are being used, all the subjects are drinking either alcohol or beer and there is no adult supervision. Can the officers, seeing these minors in possession of alcohol, enter this home without a warrant and arrest the subjects for being minors in possession of alcohol.

ANSWER: There are two or three possible interpretations of this situation. You can always arrest for a misdemeanor committed in your presence. If the officers actually saw a misdemeanor committed, and knew that the subjects were minors, I would think they could make an arrest. However, the United States Supreme Court has repeatedly said that if there is time to obtain a search warrant you must obtain one.

Nevertheless, I want to return to a basic proposition of law which I think is fundamental here. An officer always can arrest for a misdemeanor committed in his presence and it does not matter how he learned that the misdemeanor was going to be committed.

SEARCH BY CONSENT; ENTRANCE GAINED BY FRAUD AND DECEIT; EAVESDROPPING AND WIRE TAPPING

by Jerold H. Israel*

My topics this morning are eavesdropping, search by consent and entrance gained by fraud and deceit. You should be forewarned that these are areas in which the law has been "on the move" for the past few years. Changes have occurred and still more will take place in the future. I will attempt to anticipate some of those developments, but, obviously, the only safe course is keeping up-to-date through continuing education. In covering my assigned topics, I hope to paint with a rather broad brush. It has always been my feeling that the police officer cannot be expected to learn all the minor rules, exceptions to the rules and exceptions to exceptions that a defense lawyer or prosecutor must have at his command. I hope to present a general picture of the difficult problems presented in these areas and suggest means that may be used to avoid those problems.

I

Although my first subject is simply listed as eavesdropping, I would like to expand upon that topic to consider also the closely related problem of secret observation. As a practical matter, clandestine observation may be as valuable an inventory technique as clandestine listening. In considering these techniques together, I intend to point up similarities in legal treatment. It should be made clear, however, that, while closely related, the legal problems each presents are not identical.

As you all know, the Fourth Amendment prohibits illegal searches and seizures, and requires that the fruits thereof be excluded from evidence. It is sometimes said, however, that you can only have an illegal search and seizure when there is a physical seizure of property. Thus it noted that no problems are presented when an officer looks through the window of a car, sees the occupant using narcotics, and later testifies to that fact; or the similar situation when an officer looking through the window of a street storefront, sees someone burglarizing the store, and later testifies to that fact. While it is true that these cases do not present

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serious legal problems,[1] that does not sustain the position that there is nothing to worry about so long as no tangible, physical evidence is seized. You *can* have a search and seizure without a physical seizing of property. You can have a search by observation, by smelling, or by listening.

Let me give you some illustrations. Where it has been thought that homosexual activity was occurring within the confines of a pay toilet, police officers have drilled holes in the ceiling so as to be able to observe the activities of persons within the toilets. Some courts have held that such activity constitutes a search, and must meet the usual legal standards pertaining to probable cause and the need for a warrant.[2] If these standards are not met, the police officer's testimony as to what he observed within the toilets will be excluded.

Similarly, in the area of electronic eavesdropping, when an officer uses some kind of bugging device, a spiked mike for example, and picks up a conversation, he obviously is not seizing anything tangible. Yet, this activity probably will constitute a search, subject to the usual requirement of probable cause and proper warrant.[3] If these requirements are not met, the police official may not use the evidence obtained as a result of his illegal search. This would mean that the tape itself would be excluded, testimony concerning the conversation would be excluded, and testimony and evidence which had been obtained as a result of the eavesdropping would be excluded.

For many years the question as to whether a non-tangible seizure of evidence (usually by secret observation or eavesdropping) was subject to the rules of the Fourth Amendment depended upon whether there had been an unlawful physical invasion of a protected physical area. Two elements were required — first that there be a physical intrusion upon the area involved,[4] and, second that that area be one constitutionally protected from that invasion.[5] In the case I mentioned previously, that of the officer who looked through the window of a car parked in the street, neither element was present. There was no physical invasion so long as the officer was only looking into the vehicle and did not, for example, reach into the car. Moreover, the area involved — the inside of the car — was open to view by any member of the public and hardly could be considered a "protected premises" insofar as simple observation is concerned. Accordingly, the officer had not engaged in a search and he did not need probable cause to justify his action. He could testify to what he saw without regard to normal Fourth Amendment restrictions.

On the other hand, some cases of non-tangible observation clearly did involve a physical invasion. Take the case in which officers, without

[1] People v. Mallory, 2 Mich. App. 359; Boyd v. United States, 286 Fed. 930 (4th Cir. 1923). See also United States v. Lee, 274 U.S. 559 (1927).
[2] See *e.g.*, Bielicki v. Superior Court, 371 P. 2d 288, 21 Cal. Rep. 552 (1962).
[3] Silverman v. United States, 356 U.S. 505 (1961).
[4] See *e.g.*, Jones v. United States, 339 F. 2d 419 (5th Cir. 1964).
[5] See *e.g.*, Hodges v. United States, 243 F. 2d 281 (5th Cir. 1957).

probable cause, broke into the house, and then observed people in the next room engaged in illegal activities. Assume these officers later made arrests and wanted to testify as to what they observed. Since their action in breaking into the house clearly constituted a physical invasion of protected premises, their testimony would not be admitted.[6]

The presence of physical penetration was not always an issue to determine. A detectaphone employed outside the house for purposes of hearing conversations within was upheld as not constituting a physical invasion.[7] On the other hand, a spiked microphone that was first attached to the wall, even though there was a minimum penetration, did constitute a physical invasion.[8] This type of distinction could be carried to preposterous extremes. We had a California case, for example, where an officer followed a prostitute and customer to her hotel room and, by peeking through a hole in the hotel door, observed the prostitute plying her trade. Later when the officer tried to testify to this, the question arose as to whether there had been a physical penetration of that room. The court suggested that this might depend upon whether the officer had drilled the hole in the door or whether it had been there before. Apparently in some areas holes had been drilled into all the doors in this particular type of hotel, and in that case the officer himself would not have physically penetrated the premises.[9] Similarly, in the pay toilet cases, there was some concern as to whether the observations came from vents which are a natural part of the physical layout, or whether special holes had been drilled in the ceiling for observation purposes.

A recent Supreme Court decision suggests that courts need no longer concern themselves with this type of issue. *Katz* v. *United States*,[10] decided in December 1967, seems to establish new guidelines in determining when observation on eavesdropping will constitute a search subject to the Fourth Amendment.[11] The defendant Katz was convicted of transmitting wagering information from Los Angeles to Miami, a federal offense. At trial the Government attempted to introduce evidence of the defendant's end of telephone conversations overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which the defendant had placed his calls. The case was presented to the United States Supreme Court and raised two issues:

Whether physical penetration of a constitutionally protected area

[6] See McDonald v. United States, 335 U.S. 451 (1948); Whitley v. United States, 237 F. 2d 787 (D.C. Cir. 1956).

[7] Goldman v. United States, 316 U.S. 129 (1942).

[8] Clinton v. Virginia, 377 U.S. 158 (1964) rev'd. 204 Va. 275 (1963); Silverman v. United States, 365 U.S. 505 (1961).

[9] People v. Ruiz, 146 Cal. App. 2d 630.

[10] 389 U.S. 347 (1967).

[11] The *Katz* case was decided after October 11, 1967 lecture at East Lansing and the following is a substantial revision of what was said there.

is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

The United States Supreme Court gave a flat answer to the first question — "no," physical penetration is not necessary. If Katz's conversation within the booth was entitled to Fourth Amendment protection, the eavesdropping would constitute a search irrespective of whether the bugging device was located inside or outside the booth. The distinction formerly drawn between the use of the detectaphone placed outside the wall and the spiked mike which penetrated the wall was soundly rejected. Either constituted a search if the area invaded was protected.

You will recall the second question presented in *Katz* was whether the telephone booth was a constitutionally protected area. The Government argued that even if eavesdropping without physical penetration could constitute a search, all that had been searched there was a semi-public area which was not entitled to constitutional protection. The United States Supreme Court answered that argument in the following words:

> . . . Any effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . .
>
> The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

It strikes me that the United States Supreme Court here is not rejecting the concept that some areas are constitutionally protected from search (absent probable cause) while other areas are not; all it seems to be saying is that the degree to which an area is protected depends upon the nature of the invasion. The defendant could hardly complain if police testified as to their observation of his actions in a glass-enclosed telephone booth. It was a different matter insofar as his conversation was concerned.

What he said in the booth, he could reasonably assume was private; what he did obviously was not. Just the opposite situation may be true, for example, in the case of the pay toilet where the mere presence of four walls may be assumed to give one protection against observation, but the paper-thin quality of the walls may put one on notice that his conversations are likely to be overheard.[12] The crucial question, as *Katz* poses it, is whether a reasonable man could assume that he would be free from the type of invasion presented in a particular case. Of course, even if the answer to this question is "yes," this does not mean that evidence as to what was observed or overheard cannot be introduced. A "yes" answer only means that the search is subject to Fourth Amendment limitations relating to probable cause and a proper warrant. If these limitations are met, then the search will be upheld.

How does *Katz* affect cases of secret observation? When will observation constitute a search subject to the Fourth Amendment? The answers to these questions seem fairly clear in some places, not so clear in others. First, it would seem that if a person is observed in an area that is not even protected for constitutional purposes against physical invasion and search, such observation should not bring the Fourth Amendment standards into play any more than would the physical search. It might be useful therefore to consider those areas which an officer can physically invade and search without regard to Fourth Amendment limitations.

The traditional rule is that, insofar as residental premises are concerned, constitutional protection includes only the curtilage. The term "curtilage" is ordinarily defined as the "dwelling area and that area which is immediately adjacent to the dwelling area." However, this definition raises two types of problems. First, what about structures that are not immediately adjacent, for example an unattached garage? Is that part of the curtilage or can an officer just walk into an unattached garage at will on the grounds that it is not protected by the search and seizure laws? There is some dispute on this point.[13] It is very clear that attached garages are part of the curtilage. Yet I would hesitate to rely on the theory that because a garage is unattached it is not part of the dwelling and, therefore, you can enter and look around at will. It strikes me that a garage is close enough to the house and is used for purposes sufficiently related to the normal dwelling purposes that you must consider the garage to be part of the dwelling, part of the curtilage, and constitutionally protected — at least against physical invasion. Now some may disagree with me on this, but at least that is the safe way to play it.

Now, what about other buildings such as barns, smoke houses, chicken houses, and similar structures that generally are far removed from a house

[12] *Cf.*, People v. Young, 214 Cal. App. 2d 143.

[13] Compare People v. Oaks, 251 Mich. 253 (1930) with Care v. United States, 231 F. 2d 22 (10th Cir. 1956). See also Walker v. United States, 225 F. 2d 447 (5th Cir. 1955).

or dwelling. Again, there is some division on this point.[14] For some courts a barn is just like a man's office, and since a man's office is protected against a search unless the officer has probable cause and a warrant, the barn should be also. On the other hand, other courts have argued that, if an officer walks into a barn, it is just like walking in an open field and anything he happens to see is his to look at and, if it is contraband, to take. I certainly think, however, that you are risking ultimate reversal if you treat the barn as the equivalent of an open area, at least where the doors are closed. In this situation I think the officer should, if at all possible, establish probable cause and get a search warrant.

What about fields, fenced and unfenced? When are they part of the curtilage? You have two extremes. On one hand you have a man's fenced-in back patio, twenty feet by twenty feet, surrounded by shrubbery. If you are going to physically invade and inspect that area, you will probably be conducting a search for constitutional purposes, just as you would if you were inspecting the inside of the house. On the other hand, if you are just walking across a farmer's back acres, perhaps land that is not even fenced, then you have quite a different situation. You may well be trespassing but your "search" will not be subject to constitutional objection because the open field simply is not a protected area. Both the United States Supreme Court and the Michigan Supreme Court have so held.[15]

Now, I have suggested so far that the home, the garage, and the barn (at least in some situations) are constitutionally protected against a physical search. Would the same be true of an observational search of those structures by a person located outside the structure? Even if an officer could not enter for the purpose of making a search (absent probable cause, etc.), could he observe the occupants within one of these structures by looking through a window, an open door, a skylight, etc. Going back to *Katz*, it is clear that the constitutional protection given to an area may vary with the type of invasion of privacy involved. We have always known, for example, that while an officer had to meet Fourth Amendment standards to *enter* and search a car, there was no difficulty when he inspected the inside of the car by merely looking through the window.[16] Would the same be true of house, barn, garage, etc.? Yes, if the officer, like the one looking through the car window, was in a place where he clearly had a right to be; e.g., in the public street.[17] But what if he peers through the window from the front porch or from a window at the side of the house. How will that be decided in the light of *Katz*?

[14] Compare Walker v. United States, 225 F. 2d 447 (5th Cir. 1955) with Hodges v. United States, 243 F. 2d 281 (5th Cir. 1957).

[15] Hester v. United States, 265 U.S. 57 (1923); People v. Ring, 267 Mich. 657 (1934). But *cf.* People v. Ubbes, 374 Mich. 571 593-595 (1965).

[16] See note 1, *supra.*

[17] Or the public portions of a store. See Fisher v. United States, 205 F. 2d 702 (D.C. Cir. 1953).

The courts could say that every person is aware that someone might come upon his property and look through windows, and therefore, so long as the shades are up, etc., such a person is no more protected against secret observation than Mr. Katz is in his telephone booth. I doubt, however, that that will be the case. The courts are much more likely to make their answer dependent upon whether the officer had a "trespassory purpose" — i.e., whether his purpose in approaching the house or garage was solely to look through the window. A similar approach has been suggested in a related context.

Assume an officer knocks on a door, the occupant opens it to see who is there, and, as he does, the officer spots narcotics on the table. There will be difficulties here if the officer says that the reason he knocked in the first place was because he wanted to see if the occupants would "open up" so that he might take a peek at what was inside.[18] There would be no difficulty, however, if the officer knocked on the door because he wanted to talk with the occupant, and happened to notice the narcotics on the table when the door opened.[19] At that point the visual observation would not constitute a "search" for constitutional purposes; yet it would provide probable cause for an arrest and a search incident to that arrest.

I believe this same type of approach will be applied to observation "searches," where the observation is made from defendant's property as opposed to a public place. However, if the observation made from defendant's property could be made only through the use of mechanical aids, i.e., ladders, binoculars, etc., the courts may find this constitutes a search even where the officer came upon the premises for some purpose other than making the search. Under *Katz,* such observation arguably is the type of invasion to which an occupant can reasonably assume he will not be subject even from persons coming upon his property in the normal course of social or commercial activities.

Under this type of analysis, it will be important to determine whether a particular observation is made from a general public area, i.e., one to which the public generally is invited. Take the case of a hotel, for example. What will be the status of the hallways on the second, third, fourth or fifth floor of the hotel? I am not talking about going inside a room but only the hallways. It is sometimes argued that only the first floor is open and after the first floor you are not supposed to be up there unless you are a guest. This view, however, is not consistent with the realities of normal hotel practice. I think that this is a semi-public area and subject to a visual search. There is no reason why officers cannot be posted and observe what is happening in the hotel corridors, such as entry

[18] *Cf.,* Brock v. United States, 223 F. 2d 681 (5th Cir. 1955); California v. Hurst, 211 F. Supp. 387 (D.C. N.D. Cal. 1962), Affirmed 325 F. 2d 891, reversed on other grounds 381 U.S. 760 (1965).

[19] Polk v. United States, 291 F. 2d 230 (9th Cir. 1966); Ellison v. United States, 206 F. 2d 476 (D.C. Cir. 1953).

and departure from a particular room. There is no more reason why you cannot take this action than park across the street from a man's house, and observe who is going in and out. The hotel corridor admittedly is not a public thoroughfare, but it is a semi-public area which is largely open to the public. At least I would take that approach until the courts indicate otherwise. Rooming houses present a greater problem since their corridors sometimes are not open to casual visitors without advance notice. I would suspect that in the rooming house situation it is always best to get some consent before one advances beyond the first floor corridor.

So far, we have considered the impact of *Katz* only upon secret observation. What of eavesdropping? In cases where electronic devices are *not* used, I suspect the standards will be quite similar to these applied to secret observation. If the officer heard what was said while located in a public place, there will not be a search for constitutional purposes. If he was located on the defendant's property, then the crucial issue will be whether he was there as a "trespasser." What was his purpose in being at the side of the house when he overheard a phone conversation through an open window? Was he on his way to the front door, or was he there specifically for the purpose of eavesdropping? These are the kinds of questions that I believe courts will be asking in cases of this kind.

Where electronic eavesdropping is used – at least where used to pick up a conversation within a household, office, telephone booth, hotel room or other area in which one cannot readily anticipate being overheard – the eavesdropping will constitute a search for constitutional purposes. This means a warrant will be needed. I will not go into the requirements of the warrant, whether a judge in Michigan could issue one without a specific statute, etc. I think it is enough to say that if you intend to use electronic eavesdropping equipment, you will clearly need the assistance of counsel in obtaining a warrant; and you will not be able to sustain the search without the warrant.

Having stated this as an absolute, there is one limitation I should clearly make. I have been speaking so far about eavesdropping without the consent of either of the parties. When one of the parties consents, it is an entirely different situation. Thus, the courts have had little difficulty with the admissibility of tapes of conversations between the defendant and informers who were wired for sound – at least where used to corroborate the informer's own testimony.[20] Similarly, there is no constitutional objection to taping interrogations in police stations. Although one may argue that the interviewee should know that what he says is being recorded, as far as the law presently is concerned, it is adequate that either one of the parties knows this, and, of course, the police interrogator would always be aware of it.

[20] Lopez v. United States, 373 U.S. 427 (1963).

A word should also be said about wiretapping by police officers. If taps are to be admissible in court, the officer must have a warrant. Even with the warrant, however, the officer should be aware that if he divulges the contents of what he heard, even on the witness stand, he is technically violating a federal statute that prohibits all interception and divulgence without the consent of one of the parties.[21] Of course, this factor may be viewed by state judges as precluding issuance of a warrant for wiretapping. So far, we have no ruling on that point.[22]

II

I would like now to turn to the area of search by consent. This topic is not really related to the subject of secret observation and eavesdropping except in one sense: as in that area, there is the potential here for legal acceptance of a search without meeting the Fourth Amendment requirements of probable cause and valid warrant. If there is truly voluntary consent to a search, then the individual has, in effect, waived any potential objection to the possible illegality of the search under Fourth Amendment standards. The crucial question therefore is what constitutes truly voluntary consent. The Michigan Court of Appeals has said:

> It is well established that one may consent to have his person or property searched by police officers, but such waiver or consent must be proved by clear and positive testimony and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given.[23]

A heavy burden will be placed on the prosecutor in showing a voluntary consent; the courts have traditionally said that they will not lightly indulge in the assumption that a man would waive his constitutional rights by voluntarily consenting to a potentially illegal search.

Whether there has been true consent is often a matter of dispute. I am always very wary of relying upon consent to justify a search since it so frequently involves disputed testimony. An officer will testify that he told the resident of his rights and that the resident freely consented to the search, while the resident will state that he never consented, but that the officer forced his way into the house and conducted the search against his will. It is so much easier, at least for the prosecutor, if the officer had a warrant and there was no need to rely upon consent. However, this cannot always be the case. I would therefore make the following suggestions in consent situations. First, the more corroborating witnesses you have, the stronger your case. Two officers are less likely to be disbelieved than one. Second, use of a "consent form" is helpful.

[21] 47 U.S.C. § 605. See Benanti v. United States, 355 U.S. 96 (1957).
[22] See People v. Maranian, 350 Mich. 361 (1957).
[23] People v. Nawrocki, 6 Mich. App. 46, quoting People v. Kaigler, 368 Mich. 281 (1962).

Consent forms are not generally used by Michigan police, but police in other states including Illinois use them, as does the FBI.[24] The consent form is a printed form given to the individual, warning him of his rights and stating that his signature gives his consent to a search. Any prosecutor can prepare one. Use of such a form does not guarantee that you are going to win your case, but at least it gives you concrete evidence that there was consent. If, however, the man refuses to sign, you are going to have a hard time proving he ever consented by oral acquiesence.[25]

Of course, even where the fact finder accepts the proposition that the individual actually agreed to the search, the consent still may be rejected on the ground that it was not voluntarily and freely given. There are several factors the courts look to in determining whether a consent was truly voluntary. One is whether the man was in police custody.[26] If he was, that does not mean that he was automatically incapable of voluntary consent, but it does suggest that he was under pressure to consent and that he may have submitted to a search only because he thought that he had no alternative. So when a man is in custody, particularly when he is in jail, you must be especially careful in establishing a valid consent.

Even when a man is not formally in custody, there may be similar factors that will cause courts to find that consent was not voluntary — for example, a show of arms by the officers, or the fact that the request came from several officers appearing at the door in the middle of the night.[27]

Another factor is the initiation of the suggestion of a search. If the individual himself first suggested that the police make a search, it is easier to prove a voluntary consent. Consider the case of a wife who complained that her husband was threatening to shoot her. The police came over, arrested her husband, and then asked her for permission to look around for a gun. Although she had not initiated the idea of a search, she had initiated the entire proceeding. The court was very willing to say that obviously she wanted them to search for the gun, and therefore her consent was completely voluntary.[28]

In most cases, however, it is the officer who initiates the suggestion of a search and asks for consent. Exactly how the request is phrased will be very important. Did he say, "I am here to search your house, any objections?" In that case, even if the person agreed, the court is likely to say, "No valid consent."[29] Or did the officer say, "Would you mind if I searched

[24] See *e.g.*, People v. Rogers, 133 N.E. 2d 16, Ill. 2d 279 (1956).

[25] Pekar v. United States, 315 F. 2d 319 (5th Cir. 1963).

[26] See Judd v. United States, 190 F. 2d 649 (D.C. Cir. 1951); Channel v. United States, 285 F. 2d 217 (9th Cir. 1960). See also State v. Herring 421 P. 2d 767, 77 N.M. 232 (1966).

[27] See Catalanotte v. United States, 208 F. 2d 264 (6th Cir. 1953); United States v. Marquette, 271 Fed. 120 (D.C. N.D. Cal. 1920); United States v. Roberts, 179 F. Supp. 478 (D.C. Cal. 1959).

[28] People v. Shambley, 122 N.E. 2d 172, 4 Ill. 2d 38 (1954).

[29] See People v. Kaigler, 368 Mich. 281 (1962); Farris v. United States, 24 F. 2d. 639 (9th Cir. 1928).

your house? If you say no, I will turn around and go away." Obviously this type of statement makes it much easier for the judge to find a voluntary consent.

The significance of the form of the request for consent suggests an interesting question that is being raised by defense counsel throughout the land. *Miranda* holds that before you interrogate a man you have to warn him of his rights.[30] Do you have to do the same thing before you ask him to let you search his car or house? The Nebraska,[31] Kansas,[32] Illinois,[33] Washington,[34] and Louisana[35] courts have all indicated that you do not have to give similar warnings. I would not rely on that though. There are a few courts that have ruled the other way[36] and undoubtedly this problem will eventually be decided by the United States Supreme Court. That Court has indicated that it might very well extend the *Miranda* principle to search and seizure situations. Therefore, I certainly think, if possible, one should "play it safe" and attempt to give appropriate warnings in requesting consent to search.

What should such warnings contain? What are the defendant's rights in this situation? I think the first thing you have to tell him is that he does not have to let you search the house or the car. The second is that he can insist that you go out and get a warrant (unless you intend to make a search incident to an arrest). Third, he should be warned that any evidence that you find can be used against him. Finally, I think you should also tell him that he has the right to consult a lawyer, if he wants to, or to consult anybody else. I do not believe, however, that you have to tell him that he has a right to an appointed lawyer, because I do not think he has that right under these circumstances. Certainly the police officer cannot seek appointment of a lawyer in this situation. In fact, the circuit court probably lacks legislative authority to appoint counsel prior to the individual's arrest.

I think if you give these warnings in an effective manner, you aid your consent case. It makes it much easier for the court to find a truly voluntary consent. If the defendant knew that he did not have to consent, that the police could have been required to get a warrant, that any evidence found would be used against him, and that he could consult with someone before he gave his permission, then he has substantially less basis

[30] Miranda v. Arizona, 384 U.S. 436 (1966).

[31] State v. Forney, 150 N.W. 2d 915, 181 Neb. 757 (1967).

[32] State v. McCarthy, 427 P. 2d 616, 199 Kan. 116 (1967) (involving the retroactive application of Miranda).

[33] People v. Trent, 228 N.E. 2d 535 (Ill. 1967) (involving the retroactive application of Miranda).

[34] State v. Johnson, 427 P. 2d 705 (Wash. 1967) (refusal to apply Escobedo to search area).

[35] State v. Andrus, 199 So. 2d 867, 250 La. 765 (1967).

[36] See United States v. Barton, 1 Criminal Law Reporter 2145; United States v. Goggenheim, 1 Criminal Law Reporter 2127.

for arguing that his consent was not voluntary.[37]

Of course, even if the warnings are given, there may still be some problems. Courts will also look to the spontaneity of the defendant's response to the police request, i.e., the need for police persistence to gain agreement. If you ask a person's consent for a search of his house and he says "no," even though you could spend 15 minutes convincing him that he should change his mind, you are very unlikely to get a court to uphold the subsequent consent.[38] The original negative response is likely to be the decision that stands. Of course, there may be occasional cases where this will not be true. For example, the individual may have had doubts as to the officers' identity and may have changed his mind after he was satisfied that they were indeed plainclothes officers. Generally, however, if you have to persist or pester to obtain consent, you are going to run into problems.

Another factor to be considered, even where warnings are given, is the individual's capacity to understand. Do not expect to get a valid consent from a drunk, a child, or a seriously retarded person.[39] In fact, we have one case suggesting that you cannot get a valid consent from a harassed housewife.[40] The policeman there approached the woman shortly after her husband and 16 year old son had returned home badly wounded in a burglary attempt, had been treated by a doctor, and then had been whisked away by the police. The housewife denied that she had ever consented to the search, but the police claimed otherwise. The court held, however, that she had been so upset and harassed that even if she had consented, her action would not have been "voluntary."

Of course, the consent must extend to the specific area searched. You have a famous Michigan case in which the police stopped an individual for a traffic violation, and asked him if he had any contraband in his car.[41] He said, "No, go ahead and search the car." The police were looking for gambling paraphernalia, and after finding nothing in the car, they asked the defendant if he had any materials on him. He had already given his consent to search the car, but when the officer reached over to search his person, the defendant drew back. The officer persisted, searched his pockets, and found gambling materials used in connection with football pools. The police sought to introduce these materials in evidence and the court held they were fruit of an illegal search. Although the man had consented to the search of his car, once the police started talking about searching his person, he had drawn away from the officer. It was obvious that he was not as willing to have his person searched as he was his car,

[37] See *e.g.*, Rogers v. United States, 369 F. 2d 944, (10th Cir. 1966); State v. Gates, 150 N.W. 2d 617 (Iowa 1967); Gorman v. United States, 1 Criminal Law Reporter 2189.

[38] Pekar v. United States, 315 F. 2d 319 (5th Cir. 1963); United States v. Ziemer, 291 F. 2d 100 (7th Cir. 1961).

[39] But *cf.* People v. Chyc, 219 Mich. 273 (1922).

[40] People v. Lind, 18 N.E. 2d 189, 370 Ill. 131 (1938).

[41] People v. Ziegler, 358 Mich. 355 (1959).

and with good reason. The consent did not extend to the search of the person, and that search therefore had to be tested by Fourth Amendment standards. Under these standards, of course, search of the person is not justified as incidental to a traffic offense arrest.

The consent also must be current. In this connection, a recent Michigan Court of Appeals case upheld a search in a strictly borderline situation.[42] The police arrested a man and asked him if they could search his car. The defendant gave his permission. The police searched the car but found nothing. They took the defendant to the station and gave him back his keys. He was booked, and he turned over his keys to the jailer. The officers later returned and obtained the keys from the jailer. Their second search was successful. They justified it in court on the consent the defendant originally gave when first arrested. The theory was upheld, but the police here took a considerable gamble. The court could easily have decided the other way. At the time of his consent the defendant was not in jail and he was not sure he was necessarily going to jail. If the officers wanted consent for another search they probably should have gone back to the defendant and asked him again. Preferably, they should have obtained a warrant so they would not have to tie their case to consent at all.

There is one other aspect of consent which should be mentioned and that is third-party consent. We are talking about consent by a person other than the defendant. The usual rule is that valid consent can be given by any person with a sufficient interest to have possession and control of the premises being searched. That means, for example, that the husband or the wife can give permission to search the house.[43] The landlord *cannot* give permission to search his tenant's quarters since he does not live in, nor have possession or control of the tenant's quarters.[44] He can demand entry on occasion to collect the rent or to find out if the tenants are damaging the furniture, but he does not have the right to authorize the police to enter. The same is true for the hotel or motel manager, with respect to a room presently leased.[45]

On the other hand, a wife has complete control of the household. She can authorize a search, and, if the police find something that points to the guilt of her husband, they generally can use that evidence despite his complaints about the validity of the search. There are certain limits, however. First, the property searched must be jointly owned or occupied. If the wife has left the household and she comes back to visit the husband once every six months, it is not really her house and she cannot give you

[42] People v. Nawrocki, 6 Mich. App. 46.
[43] See *e.g.*, United States v. Heine, 149 F. 2d 485 (2d Cir. 1945); People v. Penoni, 153 N.E. 2d 578, 14 Ill. 2d 581 (1958).
[44] Chapman v. United States, 365 U.S. 610 (1961).
[45] Stoner v. California, 376 U.S. 483 (1964). See also State v. Roff, 424 P. 2d 643 (Wash. 1967).

consent.[46] Also, her consent must be totally voluntary. I think therefore that ordinarily the officer ought to tell the wife why he is searching the home. For example, if the husband's under arrest, the officer had best tell the wife this and state that he is searching the house to find evidence against the husband. She also should be given the appropriate warnings as to her own rights.

Finally, there may be areas where one spouse cannot consent to search. While a wife can invite you to conduct a general search of the house, perhaps she cannot authorize a search of her husband's toolbox; that may belong solely to him.[47] The same may be true of a car which is registered in the husband's name and is regularly used only by him.

A special problem arises when one of the parties objects. If the husband is present when the search request is made, and the wife gives her consent but the husband does not, I would advise *against* relying on the consent.[48] Go back and get a warrant and then you are safe. Of course, there may be a likelihood of destruction of evidence, and then you will have to take your chances on the consent.

Another difficult area of third-person consent arises out of the parent-child relationship. A parent can consent to the search of a minor child's bedroom.[49] A child cannot consent to the search of a parent's house.[50] We had a recent case in which the Michigan Court of Appeals, without much discussion, held that a grandmother, who owned the house, could not consent to the search of the bedroom of a grandson who lived in her house.[51] While the court did not emphasize this point, the grandson was over 18 and might well have been viewed as an adult boarder. Generally, the person who owns the house, the head of the household, can consent to the search in these situations.

The validity of consent given by temporary residents depends on the nature of the individual's position. A babysitter left to care for the children over an entire weekend obviously has more authority than a babysitter who is in the house only for a couple of hours. Similarly, a household painter cannot validly consent to search the whole household, but a visiting mother-in-law, placed in charge of the household, might be able to do so.[52] It is the police officer's duty to find out who is consenting to the search and to make sure that this person is one who is likely to have authority. If the person is only a temporary resident, the officer should examine the situation closely before relying upon the consent.

Of course, even though a person may not be able to permit you to search the premises, he may be able to permit you to enter the house.

[46] See People v. Weaver, 241 Mich. 616 (1928).
[47] See *e.g.*, State v. Evans, 372 P. 2d 365 (Hawaii 1962).
[48] *Cf.*, Tompkins v. Superior Court, 378 P. 2d 113, 27 Cal. Rep. 889 (1963).
[49] Maxwell v. Stephens, 229 F. Supp. 205 (D.C.E.D. Ark. 1964).
[50] People v. Jennings, 298 P. 2d 56 (Cal. 1956).
[51] People v. Overall, 7 Mich. App. 153.
[52] But *cf.* Reeves v. Warden, 346 F. 2d 915 (4th Cir. 1965).

For example, a child answers the door, and, although he cannot permit you to search the house, he can let you in.[53] That may be enough if, for example, the officer immediately sees contraband lying on a table. Since the officer was properly on the premises, his observation will not be viewed as a "search" subject to Fourth Amendment standards, and subsequent action can be based on probable cause furnished by the observation.

In addition some people can give you authority to inspect certain portions of a building. For example, a janitor cannot let you into an apartment, but he can let you look through the basement, through the hallways and through those general areas to which all tenants generally have access. (Of course, if these are semipublic areas, akin to hotel hallways, then not even the janitor's consent may be necessary.)

III

My last topic of discussion concerns method of obtaining entry. This relates to both of the other topics. If a person obtains entry by fraud, and then observes improper activities, does his observation become a search for constitutional purposes because of the fraud? If he uses fraud in obtaining consent, is it a valid consent? Courts have just begun to take a long and careful look at these questions.

What are the rules established to date? An officer cannot misrepresent himself as having a warrant when he does not.[54] Misrepresenting identity, however, is another matter and dependent on the circumstances. Assume that a plainclothes officer approaches a place where the occupants are selling narcotics, and gains entry by identifying himself as "Joe Doe," sent by "Bill Smith" to make a purchase. Upon entry, he sees narcotics activity and makes an arrest. His misrepresentation should not vitiate his action.[55] He was invited into the premises, and in no way used his misrepresentation to force admittance. He is entering what is, in effect, a place of business as a customer. On the other hand, if he identifies himself as the gas inspector who has to check on something, then he is running into trouble, since he is not really being invited into the house. He is trying to exert public authority as an inspector to gain entry. Some authorities argue the same would be true if the police officer gained entry as a door-to-door salesman.[56] The answer here is not so clear. However, this technique is rarely necessary. The use of misrepresentation to gain entry is primarily in the areas of narcotics and gambling, and here the policeman can pose as a customer. This pose has clearly been accepted by the courts.[57]

[53] See Davis v. United States, 327 F. 2d 301 (9th Cir. 1964).
[54] Salata v. United States, 286 Fed. 125 (8th Cir. 1923).
[55] Lewis v. United States, 385 U.S. 206 (1966).
[56] United States v. Mitchneck, 2 F. Supp. 225 (D.C. Pa. 1933).
[57] See Lewis v. United States, 385 U.S. 206 (1966); United States v. Bush, 283 F. 2d 51 (6th Cir. 1960).

Questions and Answers

Jerold H. Israel

QUESTION: An adult relative is living in a room of someone's house. Perhaps this resident is the sister or sister-in-law of the married man owning the residence. Can the owner of his house authorize a search of the occupant's room?

ANSWER: I think the situation becomes very questionable if that relative lives in and permanently occupies the room. Certainly the owner can authorize the searching of the rest of the house. In the *Overall* case, concerning the grandmother who consented to a search of an adult grandson's room, the Michigan Court of Appeals held the consent invalid even though the grandmother owned the residence. That case seems controlling. Of course, there is little discussion on the point, and the court might distinguish the case in a proper situation. Yet, leaving *Overall* aside, there are other problems in relying on consent in this type of case. You may find later that the relative was paying rent. Even if he or she cleans house, does the dishes, etc., this might be the rent payment. Obviously this is a fact that the officer could not discover in the first instance, yet if it made the sister or sister-in-law a tenant, you would not have a case, even if *Overall* were distinguishable. Because of these hidden booby traps concerning the occupant's status, I think you are safest in not searching. However, if you need the information immediately, you are going to be forced to take a chance and gamble.

Another problem arises where two unmarried people of the opposite sex are living together. The courts have held that these individuals are joint tenants, and as such I would treat them like man and wife, meaning that either can give his or her consent to a search. To clarify this point of joint tenancy, we are assuming that these people are, in fact, living together, rather than, for example, a fellow having one girl over on Monday and another in on Tuesday.

The courts have not dealt with the problem of husband and wife living together but having separate bedrooms. I would not worry about that, however, unless it is clear to the officer that this is the case. Obviously, it is not a police officer's responsibility to seek out all the details concerning a couple's marital relationship before making a search.

If an officer can reasonably determine that an individual seems to have the authority to sanction a search, then he should go ahead and do so — but beware of the adult occupant situation.

QUESTION: The following hypothetical question is in two parts: A person has rented a room in a rooming house or motel-apartment building. The subject is behind in rent payments and the landlord believes the subject has moved out. The landlord also felt that while a resident, the

subject's actions were of a suspicious nature. The police are called to enter and search, and as a result contraband is found. Is this search an illegal one if (a) the resident has in fact *not* moved out, or (b) the subject has left?

ANSWER: I think the crucial point, in this situation, is the reasonableness of belief that the subject has abandoned the property not whether he has in fact. The fact that he is behind in his rent is irrelevant so long as he still has a lease on the property. The key issue is whether the facts obtained from the landlord would support a claim of probable cause to believe the property has been abandoned. Of course, if the search reveals that the subject is still living there, you may have a more difficult time in showing how you had reasonable cause to believe he had abandoned his property.

QUESTION: Are you familiar with a coil device which is put on a phone wire, and yet does not penetrate the wire itself? If so, is this a wiretap or eavesdropping, and is it legal?

ANSWER: Yes, I am familiar with this device. It constitutes a wiretap, and as such is a violation of federal law, even though there is no physical penetration of the wire. The interception concept of the Federal Communications Act does not require physical penetration. What you are doing with this device is picking up a telephone conversation from the wires, and such action is subject to Section 605 of the Federal Communications Act.

Of course, this does not necessarily mean that such evidence as is gained through this device would be excluded from the courts. However, you could not hope for admission unless you had a warrant, authorizing the tap. That warrant must meet the standards established in *Berger* and *Katz* by limiting the duration of the tapped conversation, etc.

QUESTION: Would it be a violation of the Federal Communications Act, or an illegal search, if an electronic device were placed on top of or inside a public phone booth located at a gambling establishment?

ANSWER: It would not violate the F.C.C. However, as far as the Fourth Amendment is concerned, *Katz* apparently would treat it as a search, and a warrant would be needed.

QUESTION: What is the advisability of a police department using an illegal wire tap or eavesdrop surveillance in order to gain evidence of future crimes? If the future crime evidence is inadmissible, how far back can this knowledge be pushed before it becomes fruit of a poisoned tree?

ANSWER: If the information leading to future crimes was obtained by illegal wire tapping or eavesdropping, the courts would exclude that information. However, there are limitations to the poison tree rulings. If it is possible for the police to show that they would have obtained the

same information from other sources, or if the future crime is so remote as to no longer be tainted by the wiretap or eavesdropping, the information may be upheld.

Application of the poisoned fruit doctrine is difficult as a practical matter since the defense counsel often does not know there was a wiretap, or cannot prove there was a wiretap if he suspects it to be the source of the prosecutor's information. The federal courts have held that the prosecutor must tell the judge if there has been a tap. Also, once the proceedings have revealed the illegal wiretap, the burden is on the prosecutor to show that all the evidence did not come from the wiretap. If this is applied to local prosecutors, your use of the tap will be presenting them with considerable trial difficulties.

QUESTION: The following is a hypothetical question. A subject is arrested for violation of the check law. During his confinement in the county jail, and while awaiting preliminary hearings, officers go to his home and obtain a signed waiver of consent to search, from his common law wife. Under the waiver the officers are allowed to search for checks and other evidence relative to the case. During the search a revolver is discovered, seized by officers, and after a file check, found to be stolen from a tavern during a burglary six months earlier. Is the first search legal and would the seizure of the gun also be legal?

ANSWER: I would think the first search would be legal if the common law wife gave her consent while being fully aware of her own rights and that her husband was in jail. There are some people, law professors particularly, who are quite concerned about the situation your hypothetical question raises (the man in jail whose wife is confronted for consent to search). The fact of the matter is, however, that the courts have upheld these voluntary consents given by the wife when she knows all the facts. As for seizure of the gun, no matter what the purpose of the search, you can seize contraband found within the appropriate area of search. I assume the gun was found in a drawer or other place where it was appropriate to search for checks. The difficulty here is that the police seized the gun before they made the registration check that showed it was contraband. At the time they seized the gun, they had no basis for taking it.

QUESTION: Can a subject, arrested for driving while under the influence of alcohol, give his consent for a blood test or a breathalizer examination?

ANSWER: Under Michigan's new statute, the subject can give his consent to these tests when arrested for driving while under the influence of alcohol. Constitutionally, it does not matter whether he gives his consent or not because when the officer made the arrest he had probable cause to believe a crime was being committed. Ordinarily, you might need

a search warrant to conduct this kind of search; but in this case it is not necessary since if you took the time to obtain the warrant all the alcoholic content would have left the subject's blood stream.

Although this statute is labeled "implied consent" you do not, in fact, have to base this statute on consent at all, but on probable cause to make a search. This is the theory on which the implied consent cases will be sustained. However, there is no doubt that the statute seems to be inconsistent when it talks about a valid consent by a driver who is thought to be so intoxicated he cannot handle a car properly.

QUESTION: Once a person living in a residence has given an officer his voluntary consent to search the premises, and the officer has begun the search, can this resident then withdraw his consent?

ANSWER: Yes. The *Miranda* case ruled that a person who starts to waive his rights against self incrimination can always withdraw that consent and I believe the same rule would be applicable to the search and seizure area. Of course, if the resident stops the search at any point, anything the officer has found up to that point is still admissable.

QUESTION: Can a private citizen, not involved in any crime or crime investigation, but purely for personal interest, legally utilize the induction coil to monitor his own phone conversations without the consent of the conversing party?

ANSWER: The Federal Communications Act states that interception is legal with the consent of one party. This case would be no different than a man asking his secretary to listen to an extension and note the conversation. In fact, this practice is common among some attorneys. Recently adopted Michigan C.L. § 750.539(a) does not contain any "consent-by-one-party" exception, but § 750.540 still does and I gather that it controls taps, as opposed to other types of eavesdropping.

QUESTION: Does your previous answer apply to the police officer, acting in this capacity, who records his conversation with someone? In this case can the recording be used as evidence?

ANSWER: Yes, the recording can be used as evidence if (1) it's of his own conversation, and (2) the officer's willing to testify so that the recording corroborates his own testimony.

QUESTION: Are you familiar with parabolic or strategem mikes? If so, would it be an intrusion or an illegal search to monitor conversations from a distance, for example, across the street and into a private home.

ANSWER: Under *Katz,* you could do so only if you had probable cause and obtained a proper warrant. The more difficult question concerns the use of the mike to pick up conversations in public places — e.g. on the street. Can a person here claim that he was relying on the fact that he saw nobody in the street who could overhear his conversation, that he

was, in effect, caught unawares? Certainly, this argument has not been successful where mechanical devices are used for secretly observing a person's activities on a public street. Secret eavesdropping, however, might be treated differently, since the individual's expectations as to observation and eavesdropping are, in common experience, likely to be quite different.

NEW TECHNIQUES IN THE LIGHT OF RECENT SUPREME COURT DECISIONS

by David W. Craig*

There is no doubt that the recent United States Supreme Court decisions, in *Miranda*,[1] *Wade*,[2] *Gault*[3] and other cases, have had some adverse impact, at least in immediate terms, upon the effectiveness of police investigation after the crime. I have found no one who takes serious issue with that conclusion.

The real question is whether or not the police and the public can compensate for the limiting effect which those decisions have had upon investigation and the identification of criminal culprits.

We are now getting some rough measurements of how much ground has been lost since the judicial limitations have been increased.

In our own Pittsburgh Bureau of Police, the University of Pittsburgh Law School has just completed a survey of hundreds of major crime files to estimate the effect of the *Miranda* procedures upon likelihood of obtaining confessions.

Preliminary figures from that study – which will be published shortly – indicate that Pittsburgh detectives obtained confessions in 54% of the major crime cases before *Miranda* and, after the institution of full *Miranda* warning and legal counsel procedures, obtained confessions in 37% of such cases. Thus the number of confessions shrank by about one-third. Out of the total number of cases, the proportion of cases cleared by confessions dropped 17%.

Of course, the Pittsburgh Police had been giving the warnings even before *Miranda;* the affording of legal counsel constitutes the biggest change factor operative.

As a sidelight, it is to be noted that the Pittsburgh conviction rate and clearance rate remained about the same throughout the periods covered by the study.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] United States v. Wade, 388 U.S. 288 (1967).
[3] In Re. Gault, 387 U.S. 1 (1967).

In any event, this study indicates some drop in the number of confessions, making police detection work more difficult.

However, I direct your attention to another adverse effect upon police work which cannot be blamed upon the courts at all. That is the unnecessary damage to police morale caused by the exaggerated groaning of some police administrators and politicians, and by the distortions of some cartoonists who obviously have never studied any of the decisions.

Bleeding hearts can sometimes be found under the blue blouses of policemen also; those are the police officials who have done little that is constructive, except to moan about the police being "handcuffed."

The newspaper cartoons, particularly those of one national syndicate, typically showing a policeman being forced to kow-tow to a hoodlum figure, may be grimly amusing, and they may point up the urgency of new departures, but they are nevertheless vicious exaggerations which have their worst effect upon our own men, the policemen who must come face to face with the problems on the street.

The policemen read the cartoons, they hear the politicians, and they listen to their own police administrators, some of whom protest so much that they can be suspected of looking for excuses.

From the news media, the policemen also perceive the equally exaggerated distrust of the more vocal American Civil Liberties Union types, who, while standing forth against prejudice, are nevertheless content to pre-judge all policemen on the basis of the extreme mistakes which must be slapped down by high court decisions.

This damage to police morale can be eventually remedied, I believe, if we (1) stress a moderate view of the constitutional purpose of the decisions and (2) emphasize the new opportunities which grow out of the problems.

First, a moderate view of the constitutional purpose may be found in recognizing the drive for equality which has been at the heart of the recent decisions of the United States Supreme Court. Every experienced policeman knows that racketeers and professional criminals have not needed any warnings about their right not to answer and their entitlement to legal counsel; their lawyers and bondsmen are often at the police station to meet them when they are brought in. The chief effect of the decisions concerning legal counsel and interrogation has been to raise all other arrested suspects — whether or not they are youthful, poor, or ignorant — to the same higher level of civil rights knowledge which the professional crooks have possessed all along.

Undeniably we do not like this effect of raising all arrested persons to the same highest common denominator of knowledgeability. We do not like it because it makes our job tougher. But, in all logic, we must grant

that it represents the only way in which equality can be afforded in this functional area.

Secondly, as many police administrators have noted, the new problems give law enforcement new opportunities — a silver lining of good arguments.

The present situation gives the police forces of this country the best reasons we have ever had for getting improved political and public support with respect to all aspects of law enforcement — better personnel, pay scales, training, equipment and better backing by the courts.

Because it is now tougher to put criminals behind bars by post-crime investigation, we are certainly entitled to demand more consistent and more courageous sentencing action by the courts when the culprit is thus now more thoroughly convicted.

Because of the fair assumption that we do face a net loss in the effectiveness of police work unless compensating steps are taken, we now enjoy public support for finding new strengths for detective procedures and for other stages of policing as well.

Not only must we have post-crime investigation techniques which are more adroit, but also we must face up to the necessity of shifting the battleground, to attack crime and criminals more strongly on other fronts.

There are at least four functional battlegrounds for the policeman. They are:

1. Patrol functions to prevent crime.
2. Patrol functions to apprehend criminals at or near the scene.
3. Investigation prior to arrest.
4. Investigation after arrest.

The court decisions considered in this series of lectures touch upon all four of those phases. Crime-preventing patrol is affected and limited by the doctrines which restrict field interrogation. The warrant and probable cause decisions throw limits around immediate apprehension activities and also complicate pre-arrest investigation. The effect of the interrogation decisions upon post-arrest investigation has excited the greatest amount of protest from police quarters.

Because we cannot readily change the legal doctrines concerning these respective phases, the obvious opportunity is to consider what we can do as policemen to maintain and increase our effectiveness despite them. For that purpose, let us divide the above four phases into just two — investigation, on the one hand, and patrol on the other hand. Let us consider investigation first.

Investigation

In the area of investigation, most of the new administrative techniques are implied by the court opinions, as you have already considered

them at length. I will not attempt to recap the many specific techniques you have already discussed.

However, the cases only imply how policemen should work. They certainly do not spell out any clear instructions.

Effective investigation must avoid the exclusionary rules, but, to have maximum effectiveness, must frankly skirt them as closely as is possible and proper. This means that each new decision must be analyzed and applied to the operations of the particular police agency by a friendly lawyer who understands both the court decisions and the police problems and who can therefore interpret the academic strictures of the judges, developed myopically on the basis of individual cases, so that they may be applied to the vast variety of the situations which the police agency meets every day.

The idea of policemen having their own lawyers, their own police legal advisors, has been widely endorsed, by the President's Crime Commission and by others.

The outstanding exponent of this administrative technique has been the Police Legal Advisor Program of the Northwestern University's School of Law, developed by Professors Fred Inbau and James Thompson, who are participating in this lecture series. Mr. Gutterman, director of this series, is an alumnus of the program.

As the head of a department which is making full use of the police legal advisor staff technique, I endorse it specifically.

The legal counseling of police operations by district attorneys and by city attorneys, no matter how well done, is not as effective as the police legal advisor approach. In Pittsburgh we have had good working relationships with the district attorney's staff in the prosecution-preparation stage and also very sympathetic and constant help from the city attorney's office with respect to the earlier phases of the police process. (I personally can attest to that because I was the last preceding city attorney before I was dispatched to head up the police operation.)

Now, however, as one of the cities which have obtained a police legal advisor from the Northwestern Program, we have experienced the improved help to be derived from having such an advisor within our own police agency.

Our legal advisor, available to the police twenty-four hours a day, is with them at every stage — in the police academy, at roll call training, helping to write general orders and training bulletins, consulting on strategy, preparing search warrants and at the policeman's side in the field and in preliminary hearings before magistrates.

In our department, the functions of the police legal advisor have grown so rapidly that last summer we added to his staff a young police

officer who had, at that time, completed two years of law school; the same young man is now back in law school, finishing the requirements for his LL.B. degree. We are thus encouraged to think we can find future police legal advisors among the ranks of sworn officers as well as directly from the law schools.

The police legal advisor sent from Northwestern to Corpus Christi, as you may have heard, patrolled in the field with a radio-equipped car during the evenings, thus making himself personally available to policemen in the unexpected field situation. Whether legal advisors are available by patrol car or not, we find that their function as staff administrators is well nigh indispensable today.

In addition to the purely administrative responses to the new challenges, there are other approaches which rely upon new applications of equipment and tools.

The *Miranda* decision and the *Gault* decision concerning juveniles — which latter decision we have nicknamed "*Miranda, Jr.*" — made it apparent that recording techniques are necessary to establish that the required warnings have been given to suspects under interrogation and particularly to provide proof of waiver of the privilege and waiver of counsel.

Our department, like a number of others, has for some years used tape recordings to preserve both sides of the conversation when a final statement is being received from a subject. The audio tape remained ancillary to the written statement and was always subject to the possibility of editing and re-recording, so that even an unspliced tape could be suspected of having had improper police utterances eliminated from it.

Now the availability of video tape cameras with sound recorders, costing less than $2,000.00 for a complete outfit, affords us a recording device which provides not only a visual record, but also some built-in safeguards against suspicion of editing. Video tape, on which the sound and visual data are recorded simultaneously, shows a distinct blip on the screen if it has been edited. Even if the tape is re-recorded onto an uncut tape medium, a time gap may be observed as a break in the visual action.

To my knowledge, the New Orleans Police Department has been the first to experiment with the use of video tape in recording interrogations.

Of course, electronic recordings of confessions and statements are always subject to the objection that they are made only at those junctures in the process which the police desire to record. The microphone or the camera lens is not consistently present from the moment of the arrest; hence the police can be accused of applying psychological pressure to extract the confession before they turn on the recorder.

In consequence, at least one commentator has gone so far as to suggest that tape recorders be installed in all police vehicles to insure con-

tinuing surveillance of the questioning process. As I shall later point out, I think that the police vehicle in the field has more important functions, for the performance of which it will be burdened by other kinds of equipment. Therefore, I am convinced that such extreme proposals, suggesting that police should place themselves under the watching or listening electronic eye or ear from the very moment of arrest, are not presently feasible, even though they could permit the policeman to show that every word has been recorded from the time of arrest until the suspect is brought before the arraigning magistrate.

When we turn to the *Wade* decision, which requires the police to permit defense counsel to be present at lineups, apparently in the sole role of witness with no power to interfere with the proceedings, we find another useful role for the videotape recorder: to show that comparison subjects chosen for the lineup are truly comparable in appearance and age with the particular suspect, and to record the objectivity with which the lineup procedure is conducted.

Electronic tools such as the video-tape camera have many surveillance applications, outdoors and in other places where no trespass or illegal invasion of privacy is involved. Because video-tape is readily reusable, a surveillance post can make a continuous visual recording of a scene for days without the cost applicable to photographic film; the video-tape can be re-run indefinitely until a significant action is captured.

It is fortunate that the age of the *Miranda* doctrine has coincided with the age of the transistor. Miniaturized electronic components are now available to us so that sound and sight recorders can be our incontestable allies in meeting the toughest problems of proof, the questions of credibility which arise out of the contradictory testimony of human beings reporting past events.

The closed circuit TV camera, with or without video-tape recording, offers the possibility of having one operator, at a central point, replace a squad of foot patrolmen in high value areas, with constant watchfulness afforded by a group of street-mounted cameras. We have been using closed circuit TV to monitor the motorist in many situations. Why not monitor the mugger?

Compared to manpower, equipment is dirt cheap. Let us use it lavishly.

I know that wider use of public TV monitors will subject us to howls of "Big Brother" watching.

Let them howl.

That brings me to the *Schmerber*[4] decision, one case — ignored largely by the press and totally by the critics of the United States Supreme Court

[4] Schmerber v. California, 384 U.S. 757 (1966).

– that is definitely on our side. That decision, admitting into evidence a blood sample taken flatly against the will of the subject, makes clear that the privilege against self-incrimination does not apply to non-verbal physical expressions such as visual appearance.

Let us use it for all it is worth.

The Voice-o-graph and other new devices give us a growing arsenal. The beauty of it is that any new tool which serves to record and establish truth is exclusively on our side.

Admittedly, each small town police force cannot maintain its own technical surveillance manpower and equipment. However, along with central crime labs, county and state governments can establish technical task forces to be assigned to local chiefs as needed.

The only necessary condition is the frank admission that none of us can do the job alone.

Patrol

If post-crime detection and prosecution have become tougher, the strategy which makes most sense is to shift the major emphasis to effective patrol, to prevent crimes before they occur and, if not, to apprehend perpetrators before they get away.

After all, the prevention of crime is preferable to the successful prosecution of the perpetrator, in view of the human anguish and property saved by prevention.

When a crime is committed, the problems of interrogation and confessions are largely eliminated whenever our patrol actions are effective enough to apprehend the criminal at or near the scene. If the burglar is caught climbing out of the window with the goods in his arms, we do not have much of a detection or interrogation problem.

Moreover, effective patrol response to the scene of the crime serves not only to clear the offense, but, when adequately publicized, serves as the greatest deterrent to crime. The prospect of longer sentences is not a great deterrent to perpetrators, who basically proceed on the assumption that they will not be caught, but a consistently good batting average of the police in catching hold-up men, for example, at or near the scene, undoubtedly serves to lessen the confidence of criminals that they can escape after committing planned crimes.

The elements of effective patrol and response can be summarized as follows:

1. Patrol deployment – establishing beat coverage and maintaining it.
2. Alarm source – how to get the call for help to the police.
3. Police communications and control – dispatching the right number of units to the right place.
4. The response to the scene.

Of course, there is nothing new about these elements. They are as old as police work itself and, in recent years, have been extensively covered in the Wilsonian texts and in other materials.

Recently, the President's *Crime Commission Report* and its supplemental *Task Force Report on Science and Technology* have provided an excellent analysis and presentation of these elements. The developments in those reports and in the current experience and future plans of many departments make clear that a whole new range of hardware and software techniques must be fully developed to achieve the greatest effectiveness in urban police patrol.

Police administrators in almost every city are busy trying new approaches on their own and watching carefully the development of techniques by other cities. They are taking fresh looks at the old issues of one-man car applications versus two-man car applications, the measurement of beat work load, and the modification and development of patrol vehicles.

The first element — patrol coverage — involves the choice of type and quantity of vehicles, where and when you place them, and how you keep them there.

Widespread interest in the use of motor scooters has spurred several companies to begin work on the development of a patrol vehicle which would maintain the advantages of the police scooter and solve some of its disadvantages, such as its weakness in providing generating capacity for the maintenance of radio communications.

Grant No. 22 of the Office of Law Enforcement Assistance (OLEA) was given to the Los Angeles County Sheriff's Department to experiment with the use of helicopters in round-the-clock police patrol over Lakewood, California.

The deployment of patrol units involves the determination of beats — another long-familiar function of the police administrator. However, from using seat-of-the-pants estimates of work-load and casual considerations of topography and population, the techniques have progressed considerably with the advent of electronic data processing and the computer.

OLEA has given Grant No. 39 to the St. Louis Metropolitan Police Department for controlled experimentation with computer techniques in allocating patrol manpower. As originally planned, the project will involve two test districts in which deployment data will include not only called-for service but also preventive functions.

OLEA Grant No. 49, in the hands of the Philadelphia Police Department, also involves the development of an operations research model for crime prediction, using electronic data processing to help make decisions as to patrol deployment and methods.

Reflecting the unceasing police issue of specialization versus generalized units, the New York City Police Department and the City College of New York have obtained Grant No. 157 to experiment with patrol units specially assigned to respond to domestic disturbances, one of the biggest sources of unplanned crimes of passion.

In our own Pittsburgh Police, we are searching for a more objective yardstick to indicate basically where need for two-man units might override the efficiencies afforded by one-man units.

Because our particular police force is unavoidably in the emergency ambulance business, with ambulance units doing patrol work when not handling medical emergencies, our workload determination must also make provision for predicting the number of medical emergencies in each area.

The variables can be many. One formula, from the national *Task Force Report on Science and Technology,* reads: $C=(gP+hP^2)\ (1-kK)$.

Deployment also involves decisions as to time as well as place. Although many top police forces continue to operate with balanced watches or shifts, others are struggling with the employee relations problems inherent in the use of unbalanced watches, which certainly seem better designed to meet daily fluctuations in police workload.

Deployment is also inextricably linked with patrol methods. For example, field interrogation techniques, and their legal issues, have previously been discussed in this series.

A source of alarms to the police is equally important. Even if units are ideally deployed, much attention must be given to how a citizen who needs the police can call them quickly.

The installation of municipal emergency street telephones in many cities has been a big step. Even the opening up of police call boxes, as a stop-gap measure, can be useful unless the vandalism problem is too severe.

The telephone companies now have a clear mandate from the President's Crime Commission to establish one nationwide emergency telephone number — preferably a single digit number — by which any American can be immediately connected with the police of that jurisdiction. Admittedly the technical complications are sizeable but there is no reason to believe that they cannot be solved.

Adaptation of public telephones to permit the police number to be dialed without a dime is another prospective development.

Available to citizens and businesses today is a new group of alarm systems which put together conventional components to relay burglary, holdup or fire alarms through the public telephone system itself. These installations now cost less than the conventional wire and remote bell alarms. They involve combinations of intrusion sensors and silent holdup

alarm triggers to actuate an automatic telephone-dialing mechanism, which dials the regular number of the local police communications center and then transmits a pre-recorded voice message to the dispatcher, clearly stating the location and that a break-in or holdup is in progress. These silent systems have the virtue of communicating directly with the police in every instance and of communicating verbally. Although some false alarm problems have arisen, the well designed system, even though inexpensive, seems to present fewer false alarm troubles than the conventional alarm systems of the past.

Well-considered and widespread application of such building protection systems can minimize crimes against commercial, industrial, and residential premises.

The possibility of employing similar technology for the protection of pedestrians and motorists on the streets is challenging.

Modern electronics capabilities suggest that a personal police alarm could be carried in the pocket or hand of every citizen. A short-range signal from such an alarm could trigger the nearest homing beacon, among hundreds of homing beacons located on the typical utility poles of a city, thus enabling nearby police units, alerted by a sound signal, to respond at the direction of a radio compass. Here the false alarms problems are enormous and, at present, seem insuperable. The great virtue of this method, if technical difficulties can be overcome, is that the alarm could be sounded as silently and unobtrusively by the citizen on the street as by the bank teller with a hidden button.

When an alarm or call for police service is transmitted, the next key step is the handling of the call at the police control and communications center to achieve the most efficient dispatching action.

Analysis of the successive steps involved in police response has shown that improvement of control center functions can produce the largest saving of time per dollar of investment. Of course, the time required for the police unit to respond after being dispatched is, on the average, the largest single segment of time in the process. However, in face of budget limitations, more precious seconds per dollar can be saved by expenditures which speed up the dispatching decisions in the control center. A study reported in the national crime commission's *Task Force Report on Science and Technology* shows that the first place to save time is in the two minutes of control center work, even before investing in improvements to reduce the average 5 minutes of vehicle response time.

In other words, the simple step of adding one more complaint clerk or dispatcher in the control center, at an annual cost of less than $35,000 could, in a medium-sized city, save more time than adding one more patrol car, at a much higher annual cost.

Other improvement steps may require increased use of automation. Currently, for larger cities, the use of a computer in the dispatching process is the most-discussed step.

With computer-assisted dispatching, the complaint officer receives the telephone call and immediately enters the location, type of call and some brief codes into a computer terminal. The computer maintains a record of street locations in relation to police unit assignments and also a continuous awareness of unit status, and therefore, within microseconds, can begin broadcasting a recorded-voice message to the nearest available unit. If the call is not promptly acknowledged, the computer can issue a broadcast to the next most suitable unit.

Computers so programmed can also respond directly to intrusion and holdup alarms by dispatching the nearest units.

The computer uses practically no time to perform the human functions of locating an address, determining the beat, checking current status of units, and adding approved instructions.

Of course, the police car actually nearest to the scene will not always be the one first dispatched if the computer or human dispatcher does not know the precise current location of each car. Where the trouble scene is located near the edge of a beat, the nearest unit may actually be the car assigned to an adjoining beat.

To solve that problem, unit locater systems are being considered. Aside from the cost problems, such systems would appear to be valuable in middle-sized communities as well as in larger cities.

Details of the potential types of car locater systems are described in the *Task Force Report* previously mentioned. In brief, the alternative methods are:

1. A device on each police car, transmitting an identifying signal to the nearest of many receivers positioned throughout the city; the receiver would report the car, by land line, to a visual display or a computer at the control center.
2. A radar unit in each car, responding to rotating antennae, which would determine and report the car position in the same manner.
3. A radio-compass direction finder system, taking bearings by triangulation on coded radio signals transmitted from each car.
4. An inertial guidance system, tied to the car odometer, to compute and automatically report the car location to a central receiver.

Although these approaches seem to be visionary at present, they are within the realm of feasibility. For the car units alone, the cost per car could be approximately $20.00 for the first type of device, $150.00 for the radio-compass type, and $100.00 for the inertial guidance type; these figures do not include the cost of elements outside the car, however.

Of more immediate concern to many police departments is the crowded condition of the radio frequencies available to police.

Despite some recent moves of the Federal Communications Commission toward allocating more radio space, the problem remains severe in many parts of the country.

Radio technicians advocate more efficient use of the existing frequencies by "multiple frequency trunking" where several frequencies are in use by one large city or a group of adjoining smaller communities. In essence, the use of this system means that the cars in each zone or town are addressed by means of sub-audio tone coding rather than by basic frequency, thus permitting any zone or town to use, automatically, whichever one of several shared frequencies is not presently in use.

However, a more basic and less technical step toward the solution of the crowded radio band problem is to be found in better planning and coordination of the development of police radio networks within a region.

Better coordination can be achieved without setting up a police radio czar in each county or state; it can be achieved to a great extent by vountary mediation and joint planning.

In my home county, for example, we have 130 separate municipalities, each with its own police force — all using radio in some manner. Over the years, without any central coordination by the county or the state, most of the municipalities have grouped themselves into police radio networks, but the growth has been Topsy-like. Some of the existing networks cover logically-related subregions and some do not. Some municipalities are now looking for radio partners, only to find that adjacent existing networks cannot readily be expanded to include them.

Regional coordination of all further development of police radio networks is necessary. The necessity of planned networks is being underscored by the creation of the National Crime Information Center, developed by the FBI to provide rapid field information on wanted persons, stolen cars and other matters.

Indeed, even aside from the essentiality of a good regional network for NCIC purposes, the need for local field information or hot desk systems calls in turn for good intermunicipal radio arrangements. The mobile thieves and felons of today are able to cross municipal boundaries quickly. Outmanned police forces can cope with them only by well-coordinated joint action, based upon a pooling of hot information.

Conclusion

Only through smooth operational unity — in radio networks and other technical respects — can local police forces maintain the upper hand over criminals.

This fact points up the fundamental personnel considerations which are at the base of police modernization for more effectiveness.

In each department, the top command must be on the lookout for ways to combine forces effectively with other law enforcement agencies. The legal and proper development of police syndicates can be the key to police victory over criminal syndicates.

In every department, the top command, aided by staff personnel given time to plan, must keep looking ten and fifteen years ahead — whether in designing a communications center or in building qualified manpower.

Indeed, qualified manpower is the key to using most of the tools which technology can provide us. Just as the policeman of today has been required to hold his own in the developing technology which surrounds his profession, the policeman of tomorrow will have to be capable of using even more complex tools. The challenge to our human capabilities is the biggest challenge of all.

Thanks to spurs provided by the current events around us, inside and outside of the courtroom, I am convinced that we can obtain the support we need to meet that challenge.

Questions and Answers

David W. Craig

QUESTION: In reference to the study conducted in the Pittsburgh Police Department, it was reported that confessions dropped from 54% to 37%. Do you have available any figures which illustrate a corresponding drop in successful prosecutions?

ANSWER: During the period covered by the study, our clearance and conviction rate remained level. This span of time covers the period immediately prior to the *Miranda* decision and the period since *Miranda.*

This particular study, for the sake of having a workable size, dealt only with index crimes — homicide, robbery, larceny, and forcible sex.

I should also mention that the legal experts who conducted this study used standards of their own as to the significance of a confession in each case. The experts went through each entire investigation file as it stood prior to the beginning of a criminal case in court, and reviewed everything in the file to make their determinations. As every police officer knows, this is a matter of judgment on which reasonable men can disagree greatly.

On the basis of these files, the legal researchers estimated that confessions were needed in about 20% of the cases in each category. Our Detective Chief differs greatly with that estimate, and we could all take issue with it. However, it is interesting that, even from an academic viewpoint, confessions are deemed necessary in one out of five cases at least, which still makes a confession rather important.

QUESTION: Do you have any suggestions as to how the local police department could avoid the use of patrol units for emergency medical purposes?

ANSWER: Where emergency ambulance work has fallen on the shoulders of the police throughout the country, it has usually occurred because the ambulance work performed by voluntary and public hospitals has been abandoned. In some suburban communities, some of this workload has been taken up by volunteer rescue units, such as volunteer fire departments. In the large cities, however, the only hope for getting the police out of the ambulance business is to enlist the medical profession in establishing ambulance services on region-wide bases.

In our metropolitan county of almost 2 million residents (130 separate municipalities), a good ambulance service could be operated for the entire area by the county government or at the county level, to perform emergency work in close coordination with police and fire forces.

In our area, we are looking to the medical profession to organize a planning group to get the county government to take over this function. There are a number of national medical groups, within the American Medical Association, that have established standards for what an around-the-clock emergency ambulance service should be. From these standards, it is obvious that a high degree of service can be offered only if (1) the police or fire departments continue to do the job or (2) some other branch of government takes over this service in a very responsible manner.

I would like to comment that I am not sure that we want to be relieved of the emergency ambulance business. I realize that it is sound administrative doctrine that policemen should not be ambulance attendants, that we should not take the policeman with his training and qualifications and, in a sense, "waste" his special police capabilities in doing ambulance work. However, we have found that the 14 police ambulances on the streets of Pittsburgh constitute one of our biggest assets in public relations. As a result of this ambulance work, our policemen are known in every neighborhood as "angels of mercy" as well as enforcers of the law.

You must become connected with the doctors and, using their prestige and influence, seek a really professional ambulance service to free policemen of this responsibility, if in fact that is what you want.

QUESTION: Has concern been expressed on the part of police officers that the implementation and further use of computers, electronic devices, and changes in the administrative structure eventually would lead to a consideration of forming a national police force?

ANSWER: I am convinced that manpower improvement, and adoption of more sophisticated equipment by police, will mean that a national police force will *not* be created. For example, the National Crime Information Center is an example of federal-local cooperation. In this case, the federal government pays for the computer bank in Washington and for the main lines connecting regional lines. However, the cost of manning the local terminals remains the responsibility of state, county, and city police forces.

It is true that the necessity of using more sophisticated equipment, and of employing more specialized skills, does mean that many small departments will not be able to stand on their own feet totally alone. However, this does not mean that they will lose their independence. Small departments must, in the good cooperative tradition of police work, see to it that they set up joint operations with neighboring police departments, county police forces, and state police forces to take advantage of these techniques.

I am convinced that in police work, as in other areas of local government, the best guarantee of continued local independence is to see to it

that the local law enforcement agencies meet the challenge of the present age.

QUESTION: You stated in your lecture that you received confessions in 37% of the cases. Of that 37% what percentage were actually admissible at trial?

ANSWER: The appraisal of the researchers is basically that all of those 37% were or will be admissible. In order to study the cases over the longest possible period after the *Miranda* case, they are reporting on files including cases which have not yet gone to trial.

QUESTION: As lecturer, I have a question I would like to direct toward the audience. Have any of those in the audience had experience with the installation of alarm systems which use vibration sensors or other kinds of sensors for intrusion, smoke, or heat, to initiate an automatic telephone mechanism which calls the police and starts a prerecorded message? If you have, what has been your experience? Have you needed to establish regulations or licensing systems to guard against faulty installations which could produce false alarms?

ANSWER: This is Lieutenant Conley of the Dearborn Police Department. We have a number of these installations of which you were speaking located in the city. We have had no problems except for the few times false alarms were turned in by people forgetting to disconnect their alarm when entering. Other than this, there has been no problem with the operations.

QUESTION: Lieutenant, has the Dearborn Police Department sat down with the alarm companies to decide upon standard wordings for the recorded messages?

ANSWER: No, no standard messages have been established, possibly because different types of sensors are used, one for illegal entry, another for fires.

QUESTION: Possibly this is not a question but an example of the speed by which policemen might respond to calls.

I believe it is Independence, Missouri, a city of about 100,000 which has initiated a program of placing two-way radios in private cars owned by police officers. In this way, off-duty officers are able to answer felony calls or "officer in trouble" calls, if necessary, when they happen to be out in their own cars. Soon after this program was begun, an off-duty officer happened to be within one block of where an officer on duty was being attacked. I do not know how they arrange which calls the off-duty officers do or do not answer. However, this might be an answer in getting an officer to the scene of a crime more rapidly, since at any one time there are more off-duty than on-duty officers.

ANSWER: This is the first I have heard of that practice. Certainly it indicates how a relatively small expenditure of money for equipment can give the department a really big advantage.

As you may know, Philadelphia and New York, among others, have been utilizing off-duty officers by allowing them to moonlight as taxi drivers. Previously it had been the policy to forbid police officers to moonlight, particularly because a taxi driver can get involved in some pretty sticky situations. This turn-about in policy has put off-duty Philadelphia policemen, who were working second jobs, on the street with a two-way radio (in this case the taxi radio), operating against muggers who have been attacking taxi drivers.

THE SUPREME COURT AND THE POLICE

by Fred E. Inbau*

I would like to submit to you a testimonial regarding my qualifications to speak on this particular subject, "The Supreme Court and the Police." A former student of mine was a guest in the home of a former Justice of the United States Supreme Court. In the course of the after-dinner conversation the Justice got to talking about me and he ended his comments by telling this former student of mine, "You know, the trouble with Inbau is that he thinks like a cop." Gentlemen, I took that as a bit of a compliment. I would like to have been in a position to retort by saying, "I wish some judges would occasionally think like cops."

In order to understand the United States Supreme Court's role in the administration of criminal justice and law enforcement, consideration must be given to the fact that the courts of this country comprise one, but only one, of the three basic branches of our government. Our Constitution embodies the concept of divided responsibility, with the judiciary, the legislative, and the executive branches all serving as checks upon each other. The rationale back of this was the avoidance of the possibility of any one branch exercising absolute control.

The police function comes within the executive, not the judicial branch of government.

Within the federal system the United States Supreme Court has supervisory power, and direct control over lower federal courts. By the exercise of that power the Court has been able to exert some indirect control over federal law enforcement officers. For instance, by prohibiting the trial court use of certain kinds of evidence, because it may have been obtained by means which the Court considers offensive (even though not unconstitutional), the Court will, in effect, be telling the federal officers, "don't do it again."

No such supervisory power prevails with regard to state courts. The United States Supreme Court's jurisdiction in state criminal case situations arises from the application of such constitutional provisions as the "due

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process" and "equal protection" clauses of the Fourteenth Amendment. Nevertheless, in decisions involving such issues the Court does, in effect, exert what may be viewed as a measure of direct control over state courts, and indirect control over state police functions. For example, when the Court reverses a state court conviction based upon the use of a confession obtained in violation of "due process," it has thereby exerted some measure of direct control over state courts and a form of indirect control over state law enforcement officers. They are told, in effect, "don't do it again."

Beyond such forms of indirect control incidental to the supervision of lower federal courts, or incidental to the preservation of such rights as "due process," the United States Supreme Court has no lawful authority to "police the police." That responsibility is not one for the judiciary. It belongs primarily to the executive branch, with supplemental grants and limitations accorded by the legislative branch.

Let us now take a look at what the United States Supreme Court has been doing in two important areas of the law: (1) criminal interrogations, and (2) searches and seizures. After doing so, you may then be in a position of deciding whether the Court was merely "protecting the Constitution," as many have said, or whether it was "policing the police," as I have said upon many occasions.

In an early series of confession cases from down South, the United States Supreme Court very properly reversed a number of convictions based upon confessions obtained by the use of interrogation practices that no self-respecting law enforcement officer could possibly condone. What was declared improper were practices which might well extract confessions from innocent persons. No one in good conscience could argue that due process was not violated when such confessions were used as evidence in criminal prosecutions.

In 1943, however, the United States Supreme Court began to emerge from its constitutional role as protector of due process in criminal cases into its role as overseer of the police. It was easy in federal cases to do so, by the simple expedient of invoking its supervisory power over lower federal courts. In *McNabb* v. *United States*,[1] the Court excluded a confession obtained by federal officers which had resulted from interrogation methods the Court considered "uncivilized"; in this instance, it was a delay in taking the arrestee before a judicial officer, which delay was for the purpose of interrogating the arrestee. This action was the forerunner of what is referred to as the *Mallory* rule,[2] or more properly the *McNabb-Mallory rule* — the rule excluding a confession where it had been obtained as a result of a breach in the prescribed restrictions on federal investigative procedures, and irrespective of whether the confession was voluntary or involuntary. [In 1967 Congress legislated this rule out of existence, as

[1] 318 U.S. 332 (1943).
[2] Mallory v. United States, 354 U.S. 449 (1957).

it was privileged to do, since it was not based upon constitutional grounds.]

The year after the *McNabb* case was decided, the United States Supreme Court applied a restriction on state interrogations which went beyond the conventional protective tests of due process. In *Ashcraft* v. *Tennessee,*[3] the Court enlarged the concept of due process by holding that a confession must be excluded if it had been obtained pursuant to what the Court described as "inherently coercive" interrogation practices. The Court did not examine the facts of this case to determine whether the particular confession was untrustworthy, or of an involuntary nature; it merely made a psychological appraisal of the situation and came to the conclusion that the length of the interrogation alone made it inherently coercive, and consequently the confession could not be used as evidence.

Over the years since *McNabb* and *Ashcraft,* the United States Supreme Court kept tightening the permissible bounds of criminal interrogation. The knot was tied in the 1966 case of *Miranda* v. *Arizona,*[4] with which you are all familiar. The Court's mandate required that a person *in custody,* or who had been *deprived of his freedom in any "significant way,"* must be warned (1) that he has a right to remain silent, and that he need not answer any questions; (2) that if he does answer questions his answers can be used against him; (3) that he has a right to consult with a lawyer before or during the questioning of him by the police; and (4) that if he cannot afford to hire a lawyer one will be provided for him without cost.

All of this was newly made law. Just a few years prior to this *Miranda* decision the United States Supreme Court had held that there was no right to counsel during the investigative, or police stage of a case; and over thirty states had held that there was no requirement that a person being questioned by the police must be warned of his self-incrimination privilege.

The prediction of some of us that the issuances of these warnings would severely handicap law enforcement efforts to solve crime has come true.

You will be interested in a report issued by a Congressional Committee on Constitutional Laws of the Committee of the Judiciary, The Senate, 90th Congress, First Session.

One of the witnesses before this Committee, Arlen Spector, the District Attorney of Philadelphia, testified that the percentage of persons arrested for serious offenses who refused to give statements to the police increased from 10% in 1964 to 59% in 1967.

[3] 322 U.S. 143 (1944).
[4] 384 U.S. 436 (1966).

The highly respected district attorney of New York County, Frank Hogan, told the same committee that for six months *prior* to the *Miranda* decision, out of approximately 2500 felony cases presented to the grand jury, roughly 45% of the accused persons had made incriminating statements. During the first six months after *Miranda* the percentage dropped from 45% to 15% and continued approximately at that rate for the next six months. In other words, for the year after *Miranda* the rate of confessions had decreased from 45% to around 15%. Hogan also stated that prior to *Miranda* it was rare in New York County for a homicide suspect to refuse to make some kind of a statement. But after the *Miranda* warnings were given to 216 suspects in homicide cases 64 refused to give any kind of statement. Hogan concluded that the *Miranda* rule caused a significant reduction in the number of defendants who give incriminating statements.

In Cook County the State Attorney's Office is now getting only half the number of confessions in homicide cases that were forthcoming before *Escobedo*[5] and *Miranda.*

In appraising these figures we all have to bear in mind the fact that a large percentage of serious crimes can only be solved as the result of the interrogation of suspected persons picked up on reasonable suspicion.

I can respect the views of people who say that the *Miranda* decision and the principles expounded by the United States Supreme Court in the majority opinions are highly desirable despite these adverse effects on law enforcement. However, I do not respect the viewpoint of those who say the decision has not hampered law enforcement. [In 1967 Congress passed a bill which will, if upheld as constitutional, greatly diminish the effect of the *Miranda* decision.]

Now, as regards search and seizure. What is the practical effect of what the United States Supreme Court has been doing in this area?

On many occasions the United States Supreme Court has very narrowly construed the requirement of "probable cause" or "reasonable grounds" in determining the validity of a particular search or seizure. And as you know for many years the Court had required that evidence seized by federal officers who acted upon less than "probable cause" or without "reasonable grounds" be considered unusable in the federal courts. About half the states followed this same exclusionary rule concept. The other half had rejected it, as they were privileged to do, since it was not a rule of constitutional dimensions. But then, in the 1961 decision of *Mapp* v. *Ohio*,[6] the Court held that it was a constitutional requirement and all state courts had to follow it.

The *Mapp* decision has jeopardized the compromise solution which the people of Michigan had worked out in several constitutional conven-

[5] Escobedo v. Illinois, 378 U.S. 478 (1964).
[6] 367 U.S. 643 (1961).

tions. It is going to be difficult to convince the United States Supreme Court that the Michigan compromise – excluding illegally seized evidence generally, but making an exception regarding firearms and narcotics – has any validity in light of what the Court itself did and said in the *Mapp* case.

Another United States Supreme Court decision in the search and seizure area that very materially affects the states is the one in which the Court held that the state courts must follow the federally developed test of "probable cause" or "reasonable grounds" in appraising the validity of the police conduct in making a search and seizure. One of the states most affected by this rule is California, which had voluntarily adopted the exclusionary rule in 1955. The California courts, in a large number of cases, had worked out some standards that were being understood by the police. But in the 1963 decision of *Ker* v. *California*,[7] the Court said that California had to measure up to the federal viewpoint.

Although the United States Supreme Court, in my opinion, has been construing "probable cause" or "reasonable grounds" too narrowly, the Court did give law enforcement a break in one of its decisions which indicated that the Court would be more tolerant in its appraisal of seizures made after the police had obtained a search warrant. In other words, with a critical appraisal of police action without a warrant the evidence seized may be declared inadmissible, whereas a more tolerant view would be taken as to "probable cause" if a determination had been made by a judicial officer from whom the police had secured a warrant.

It is advisable, therefore, for you to always secure a search warrant whenever time and circumstances permit.

There are some serious misconceptions back of much of what the United States Supreme Court has been doing: misconceptions regarding police practices, their consequences, and also the substitutions that will have to be made for the condemned practices.

The first misconception harbored by the United States Supreme Court and one which commonly prevails is that our penal institutions are housing a lot of innocent people, people who are there because of certain kinds of horrible police practices. The corollary to that misconception is that if this is so – if there are lots of innocent people in the penitentiary – then there must be something wrong with the system of criminal justice that puts them there. The fact of the matter is that there are very few innocent people in any of our penitentiaries. On the other hand the streets are overcrowded with people who ought to be in a penitentiary.

While our system of criminal justice is subject to improvement, I suggest to you that it did not require the complete overhauling that has been administered to it in the last few years.

[7] 374 U.S. 23 (1963).

I think you might be interested in some figures I obtained recently that lead me to believe that there is a related misconception with respect to the penitentiary situation, at least in Illinois. In July 1956 we had 4,508 inmates in the Illinois State Penitentiary. In 1961 that figure had gone up to 5,237. Then a decline set in, until now, as of September, 1967, there are only 3,682, a decrease of approximately 1,500 inmates. I mention this not to advocate that we fill up all these vacant rooms, but only to demonstrate that in Illinois anyway we are not even sending, or keeping, very many guilty people in the penitentiary.

Rarely is an innocent person convicted, and when it does happen it usually is due to a basic fault of human nature — the fallibility of eye witness identification.

There is another misconception with respect to police practices. The idea exists that there is a great deal of police lawlessness going on, whereas it is the exception rather than the rule. There exists a prevailing myth that the conditions of the days of the Wickersham Committee in the early 30's are still prevailing. And the very judges who cite the Wickersham report overlook the fact that our judicial system in those days was in pretty horrible condition too. Just read what went on in the trial of Richard Bruno Hauptmann — the deplorable conditions under which that man was tried. He was undoubtedly guilty, but by our present day standards he was entitled to a fairer trial. What I am trying to say is that it is not fair to look upon the Wickersham Committee days and say that this is the condition today. If this were so then we would have to make the same kind of evaluation with respect to court practices. We would have to assume that the conditions under which Hauptmann was tried are still prevalent today with respect to the judicial system. I think it may help at times to remind some lawyers and judges of this.

There is a confusion in the minds of the courts, and I think in the minds of the public generally, with respect to the role of the police in ordinary criminal case investigations, and in crime prevention, and the role the policemen have to play in the civil rights difficulties. Unfortunately, when a policeman has to move in on a civil rights disturbance he is the symbol of all that is wrong with our society. And the TV camera shots of policemen wrestling with some protester, putting him in a paddy wagon after he has kicked the policemen in the shins, creates an image of the policeman that I think brings about some unfavorable consequences with respect to ordinary criminal investigations.

We might also mention the misconception that law enforcement and crime prevention can be effective without "invasions of privacy." There is a failure to appreciate the fact that law-abiding citizens are called upon in many instances to sacrifice their privacy in the public interest and in the public welfare. Let me illustrate this point through the following example.

Some months ago I received a little note from the Internal Revenue Service asking me to come on down at a certain date and at a certain time to explain a couple of items on my income tax return. I did not tremble when I read this "invitation," but I was a little bit annoyed. One item checked off was office expenses in my home. About a third of my income is derived from writings, most of which I do at home. I use a den exclusively for that purpose in my home. Well, I thought the figures that I had in my return indicating this outside income warranted a one-sixth business deduction from my apartment rent.

The evening before I went down to the Internal Revenue office I spent about 4 hours getting out cancelled checks and everything else, because I had to account for some miscellaneous expense items. The next morning I was there at the designated time. I waited close to 40 minutes before my name was called. When my name was called I walked by some other people who were all viewing each other suspiciously, of course, and one man whom I did not know, but who obviously knew me, said, "Inbau, you too!" Well, I went to a little room and bared my financial soul to a young lady for about a half hour. Ultimately I was "exonerated."

This was not a very pleasant, exhilarating experience I assure you. I was annoyed. But I did not protest then. Nor do I protest now. In fact I believe it is a fine thing for the government to check up on taxpayers, to make spot checks, and to do what was done to me if the internal revenue service is suspicious of a tax return. This is all in the public interest and welfare. And it is my duty as a citizen to subject myself to this kind of invasion of privacy and inconvenience. Businessmen, too, have to subject themselves to invasions of privacy. Those of you that have travelled abroad and come back and have had some custom officer go through your luggage, particularly your wife's luggage, know what it is to have your privacy invaded. But if you and I, and other citizens have to do this sort of thing in the public interest I just cannot appreciate the furor made over a police officer's stopping a person under reasonable suspicion to inquire who he is and what it is he is doing at 2 a.m. in an area of a high incidence of serious crimes. And I fail to appreciate the hysteria that is promoted by various groups on behalf of individuals in situations of that sort.

Exponents of the viewpoint that the police should be severely limited in their investigative procedures have brought on a situation whereby something else must be substituted in order to prevent utter chaos. What are the alternatives, if any?

One alternative is to beef up crime prevention procedures, and one of the most effective would be to have a policeman stationed at every street corner, or at least to greatly enlarge the size of our police forces. This alternative, I suggest, may ultimately prove more objectionable to the ultra civil libertarian element than the powers once had by a smaller number of police.

Another of the available alternatives is to do what is now being tried out in various parts of the country – closed circuit television surveillance of parks, streets, alleys, subway stations, and trains. But this also involves "invasions of privacy." I believe that most persons would prefer to run the remote risk of being stopped, questioned, or even frisked by a policeman, rather than be viewed on a television screen as they lounge or walk in the park with a female companion, or as they go about their everyday affairs of life.

I am afraid that the exponents of more and more restrictions on the police, in their desire to achieve the ultimate in civil liberties, may eventually bring about substitute police procedures or techniques that will be far more intrusive than those which they have replaced.

Let me make one further observation of a related nature – the proposed gagging of the press, in crime news reporting, in an effort to eliminate the risk of prejudicing an accused person's right to a fair trial. This is a risk which I think is grossly overrated.

A potential dictator could hardly ask for more than an enormous number of policemen and a gagged press.

Gentlemen, regardless of whether you approve or disapprove of what the United States Supreme Court has been doing, I urge upon you full and complete compliance with the newly established rules. In a democratic society you are obligated to follow the rules. The blame for the consequences will not rest upon your shoulders but upon the shoulders of the makers of the rules. Do what you can to be effective within those rules. In a democratic society this is the way it has to be done. As hard as it is for you to accept it, this is your obligation. This does not mean you are not privileged to criticize what is going on, to suggest possible changes. In a democratic society you have that right.

There are some people who feel that I am betraying the legal profession by being critical of the United States Supreme Court. I think that in a democratic society no branch of government is immune from criticism. It is leveled at the President, at the legislatures, and there is no reason why we cannot, in a democratic society, criticize the judicial branch of government.

I think there will be some changes coming, or some measure for restoration of this balance with respect to the police function. Ultimately there will be some changes in the attitude of the Unied States Supreme Court, although this very likely will entail a change in the composition of the Court with respect to the matter of future appointments.

There is ample precedent for change. As a matter of fact, when *Miranda* came along that was quite a change from what the United States Supreme Court itself had said in a five to four decision just a few years before in the *Crooker* and *Cicenia* cases, which held that there was no

constitutional right to counsel in the police station. The unfavorable consequences of the *Miranda* decision may ultimately bring about a considerable modification of it, or perhaps it will even be overruled. And this would be the quickest and easiest way to get back on the track. [As already noted, however, Congress has enacted a bill which, if upheld, will accomplish that objective.]

I think there is something that can be done by the law-abiding public through its representatives in making an effective presentation of the policeman's problems in the cases coming before the United States Supreme Court. This is going to be done in the stop and frisk cases. An organization which O. W. Wilson, Jim Thompson, and a few others of us established recently – *Americans for Effective Law Enforcement* – have obtained permission to appear as amicus curiae (friend of the court) in those cases. Thompson will write the brief and present, if permission is granted, the oral argument. We are going to speak not with reference to the particular case, but rather try to persuade the Court not to come down with another hay-maker that will handicap police in all stop and frisk type situations. Hopefully this will be effective.*

We are also attempting, through this new organization, to educate the public as to what is facing them and what is on the boards for the future. We are trying to see if we can develop enough public expression of concern so that there will be some moderation of this trend to which we have been subjected during the past decade.

I also have a feeling that ultimately we will need some more realism in the teaching of criminal law. There are very few criminal law teachers in this country who have any real understanding of the policeman's problems. One thing you may do in your communities in an effort to achieve a better understanding is to invite law students, the future lawyers, judges, and law professors, to take rides in police cars at night. Let them see first hand what the police are up against. You will run the risk of having the students come upon situations they will view in an unfavorable light. You will encounter that, but I think the net gain will be good for law enforcement.

We may be able to secure some helpful legislation within permissible constitutional limitations, but if all of this fails then we will have to strike out for constitutional amendments. This is a democratic way of doing things. Our organization, *Americans for Effective Law Enforcement*, will prepare model constitutional amendments and bring this to the attention of the people and we trust that maybe this will bring about relief if it is not forthcoming by these other more expeditious means.

Let me offer you a few suggestions of some things that you yourself will have to do by way of rendering your work more effective within the

*Our brief was filed in November, and on June 10, 1967 the Court did sustain the constitutionality of "stop and frisk."

constitutional limitations. There must be an improvement in the quality of the police across the country – and mostly by a careful screening of applicants. Policemen will have to be selected and promoted on a merit basis. I think particular emphasis will have to be placed upon integrity, intelligence, and psychological stability in the selection process. Adequate salaries will have to be forthcoming in order to attract and retain desirable personnel. The police across the country are grossly underpaid. We must have adequate training and particularly in the field of criminal law and community relations. We will need effective internal supervision as to integrity and abusive practices.

Self-policing is much more desirable and it is far more effective than civilian review boards or the overseeing of your functions by the judiciary. It is much better for you to bring about these changes rather than have some other groups trying to impose their concept of what is required. You can do it better than any outsiders. You can be more realistic about it. You know the internal problems. Face up to the fact that effective internal policing is absolutely necessary.

There will have to be a let up of pressure from political interference on the ward level as well as on the higher echelon level with regard to the enforcement of the law and especially in the area of organized crime. Some real effort will have to be made to reduce the political pressures that are brought to bear upon many police agencies in this country. This is something else that we hope to be able to do with *Americans for Effective Law Enforcement.*

With respect to organized crime there will have to be, certainly in the metropolitan police departments, intelligence units to look into the matter and find out precisely what is going on.

What does the future hold? It is not too clear in my crystal ball, but I think you will find in the not too distant future a change in judicial attitude. I know it is already here with respect to some of the lower courts. And any number of judges in pretty high positions have told me: "Keep on saying what you've been saying; I wish I could do the same." There will be a change in public attitude, as soon as the public is adequately informed. Pretty soon the public is going to be fed up with this notion that a policeman's greatest delight is the exercise of brutality against minority groups. They will come to the realization that there is a need for police activity in this area, and that there is a need for the police in the prevention of crime and the apprehension of criminals, so as to make our homes and streets reasonably safe again.

With this change in public attitude, and in judicial attitude too, and with a conscientious effort on your part, in the not too distant future the insignia you wear on your uniform will be a badge of honor and not a badge of shame.

Questions and Answers

Fred E. Inbau

QUESTION: The *Miranda* ruling discouraged the police to the extent that many gave up on interrogation. Do you see any trend toward a real effort on the part of the police to obtain waivers and then proceed with an effective interrogation?

ANSWER: By all means seek a waiver. Some persons will talk even after the warning. And the United States Supreme Court said in *Miranda* that there could be an interrogation after an "intelligent waiver." I wonder what the Court will say, though, when the argument is made that any guilty person stupid enough to talk and confess after the liturgy of the warnings is not capable of making an "intelligent waiver."

Prior to *Miranda,* interrogators – and I did this myself – could talk a suspect out of his refusal to talk, but that cannot be done any more.

QUESTION: In view of the current court trend do you feel a *Miranda* type warning is or will be necessary for parties involved in a traffic accident under investigation?

ANSWER: First let me repeat, the warnings are required only when a suspect is in custody or otherwise deprived of his freedom in "any significant way." As a test, you might ask yourself, in a particular case situation, what would I do if the driver insisted on, or tried to leave?

Whether the United States Supreme Court would require the warnings in minor offense situations remains to be seen. The mere stopping of a motorist for speeding should not present a situation requiring the warnings. Nor should they be required in an accident scene "field interrogation." I would suggest that in any serious traffic offense situation, where the driver has been deprived of his freedom in a "significant way" the warnings should be given.

QUESTION: Do you believe the police will ever reach the standard of professionalism accorded doctors, lawyers, and so forth?

ANSWER: I hope so, and would certainly advocate that you strive toward that end. However, being realistic, it is not likely that the public will ever develop a great affection for the police. But lawyers are not held in great affection, either. You will probably have to settle for the personal satisfaction of rendering conscientious public service.

It is very necessary that politeness be exercised in all situations, because what happens on the street in a traffic matter will mold the thinking of the citizens who serve on juries in serious criminal cases.

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